

Nos. 77-1518, 77-2212
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNIVERSAL CITY STUDIOS, INC., a corporation,
Plaintiff and Appelles,

vs.

RKO GENERAL, INC., a corporation, DINO DE LAUREN-
TIS CORPORATION, a corporation, and RICHARD
COOPER,
Defendants and Appellans.

RKO GENERAL, INC., a corporation,
Counterclaimants and Appellans,

vs.

UNIVERSAL CITY STUDIOS, INC., a corporation,
Counterdefendants and Appellee.

On Appeal From the United States District Court for the
Central District of California.

Appellee Universal City Studios, Inc.'s
Responding Brief.

Plaintiff, Counterdefendant and Appellee Universal
City Studios, Inc. ("Universal") respectfully submits
its responding brief in Case No. 77-1518 and Case
No. 77-2212.

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man's mere reviewing of the Motion Picture before creating his own screenplay does not constitute an act of infringement. *Grove Press, Inc. v. Collectors Publication, Inc.*, 264 F. Supp. 603 (C.D. Cal. 1967); and see, *Fuld v. National Broadcasting Company, Inc.*, 390 F. Supp. 877, 882, n.4 (S.D.N.Y. 1975).

2. Counterclaim — Count II — Unfair Competition.

RKO contends that even if the Novel and Serializations are in the public domain, Universal is guilty of unfair competition because it used the title "King Kong," and the character and goodwill of King Kong in certain trade advertisements and press releases announcing its forthcoming motion picture [RKO O.B. 40]. RKO cannot recover on this theory because: (a) it does not have exclusive ownership and right to use of "King Kong"; (b) California law does not grant relief for unfair competition in absence of a likelihood of public confusion, which RKO has failed to prove; (c) damages may not be recovered based on California's "anti-dilution" statute (California Business and Professions Code, § 14330); and (d) RKO has not been damaged by any of the actions of Universal.

a. The Name, Title and Character of "King Kong" Are in the Public Domain.

If the Court finds the Novel and the Serializations are in the public domain, then the name, title and character of "King Kong" are also in the public domain, and anyone has a legal right to make a motion picture entitled "King Kong." *Walt Disney Productions v. Souvaine Selective Pictures*, 98 F. Supp. 774 (S.D. N.Y. 1951), *aff'd*, 192 F.2d 856 (2d Cir. 1951) (Held: anyone has a legal right to make a picture based on Lewis Carroll's book (which itself is in the

public domain) and entitle it "Alice In Wonderland"). Accord: *McCaleb v. Fox Film Corp.*, 299 F. 48 (5th Cir. 1924).

Thus, once a property is declared to be in the public domain, subsequent users of that literary property have the right to identify it by the name that was used to identify it when it was protected.

b. Under California Law RKO Cannot Prevail on a Claim of Unfair Competition Without Showing the Likelihood of Public Confusion.

A showing of likelihood of public confusion is essential to an award of relief for service mark infringement or unfair competition in California, *Coffee Dart's, Inc. v. Coffee Don's Charcoal Broiler*, 305 F. Supp. 1210, 1213 (N.D. Cal. 1969). RKO made no such showing in this case and its feeble attempt to show public confusion by the testimony of one witness, Universal's Vice President in Charge of Sales, Henry Martin, was a totally insufficient offer of proof. Whether one particular witness was or was not confused does not prove public confusion. *DeCosta v. Columbia Broadcasting System, Inc.*, 520 F.2d 499, 514 (1st Cir. 1975).

c. California Law Does Not Permit a Damage Recovery Under a Dilution Theory.

California law does not recognize a "trademark dilution" theory of recovery in unfair competition actions except under California Business and Professions Code § 14330. However, that section has been interpreted to permit a plaintiff only injunctive relief and not damage relief. *Dawn v. Sterling Drug, Inc.*, 319 F. Supp. 358, 363 (C.D. Cal. 1970).

d. RKO Has Suffered No Damages.

RKO virtually admits that it has suffered no actual damages as a result of Universal's conduct [RKO O.B. 39]. Undaunted by that simple fact, it seeks to have

this Court impose massive punitive damages which have no relationship to actual damages [RKO O.B. 45-47]. Such a request completely ignores the long established rule in this jurisdiction that the imposition of punitive damages must be based on a finding of actual damages. *Mother Cobb's Chicken Turnovers v. Fox*, 10 Cal.2d 203, 73 P.2d 1180 (1937).

Conclusion.

For the reasons set forth above Appellee Universal urges that this Court affirm each of the judgments appealed from.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

10

11 UNIVERSAL CITY STUDIOS, INC.,
a corporation,

12 Plaintiff,

13 vs.

14 RKO GENERAL, INC., a corporation,
15 DINO DeLAURENTIIS CORPORATION, a
corporation, and RICHARD COOPER,

16 Defendants.
17
18

No. CV 75 3526 R

COMPLAINT FOR
DECLARATORY JUDGMENT
OF INVALIDITY AND
NON-INFRINGEMENT
OF COPYRIGHT

19 Plaintiff Universal City Studios, Inc. ("Universal")
20 alleges:

21 1. This action arises under the Copyright Act of
22 the United States, Title 17, United States Code, §§ 1 et seq.
23 ("the Copyright Act"). The claim seeks a declaration by the
24 Court of the invalidity and non-infringement of an alleged
25 renewal copyright under the Copyright Act and under Title 28,
26 United States Code § 2201. Jurisdiction is conferred by
27 virtue of Title 28, United States Code, §§ 1338(a) and 2201.

28

29 2. Universal at all times herein mentioned was and
30 is now a corporation duly organized and existing under and by
31 virtue of the laws of the State of Delaware and qualified to
32 do business in the State of California, with its principal

1 place of business in Los Angeles County, California.

2

3 3. At all times herein mentioned, defendant RKO
4 General, Inc. ("RKO") was and now is a corporation organized
5 and existing under and by virtue of the laws of the State of
6 Delaware, qualified to do business in the State of California
7 and transacting business and having its principal place of
8 business in Los Angeles County, California. Prior to the
9 date hereof, RKO has succeeded to all the rights of its
10 predecessor corporation RKO Radio Pictures, Inc.

11

12 4. At all times herein mentioned, defendant
13 Dino DeLaurentiis Corporation (hereinafter "DeLaurentiis")
14 was and now is a corporation organized and existing under
15 and by virtue of the laws of the State of Delaware, qualified
16 to do business in the State of California, and transacting
17 business and having its principal place of business in Los
18 Angeles County, California.

19

20 5. Defendant Richard Cooper is the son of Merian
21 C. Cooper. Merian C. Cooper was one of the writers of the
22 novel entitled "King Kong" as hereinafter described.
23 Universal is informed and believes and on that ground
24 alleges that Richard Cooper is a resident of San Diego
25 County, California.

26

27 6. Universal and its subsidiary and affiliated
28 corporations are engaged in the financing, production and
29 distribution of theatrical and television motion pictures.

30

31 7. Edgar Wallace and Merian C. Cooper wrote the
32 King Kong story. It has been published and copyrighted as

1 follows:

2 7.1 A two-part serialization entitled "King
3 Kong" by Edgar Wallace appeared in the February, 1933,
4 and March, 1933, issues of "Mystery Magazine" (the
5 "Mystery Magazine serialization"). The Mystery
6 Magazine serialization was not separately copyrighted.
7 The February, 1933, issue of "Mystery Magazine" carried
8 a copyright notice as follows: "Copyright, 1933, by
9 Tower Magazines, Inc."; copyright registration of
10 this issue was made by Tower Magazines, Inc. under
11 Entry No. B:176982, showing a publication date of
12 December 20, 1932. The March, 1933, issue of
13 "Mystery Magazine" was copyrighted by Tower Magazines,
14 Inc. under Entry No. B:187893, showing a publication
15 date of January 23, 1933. Neither copyright was re-
16 newed and, accordingly, each has expired.

17
18 7.2 A novel entitled "King Kong" (the "King
19 Kong novel") conceived by Edgar Wallace and Merian
20 C. Cooper and novelized by Delos W. Lovelace was
21 published by Grosset & Dunlap, Inc., a corporation,
22 and Grosset & Dunlap, Inc. applied for and received
23 a certificate of copyright in the King Kong novel,
24 with the following registration number and registra-
25 tion date: A:58583, December 29, 1932 (the "Grosset
26 & Dunlap copyright").

27
28 7.3 After publication and registration of the
29 Mystery Magazine serialization and King Kong novel,
30 RKO published (i.e. released) and registered for
31 copyright a motion picture photoplay entitled
32 "King Kong" (the "King Kong photoplay") with the

1 following copyright registration number and registra-
2 tion date: LP:3794, February 24, 1933. RKO further
3 applied for and received a federal statutory renewal
4 copyright in the King Kong photoplay with the
5 following federal renewal copyright registration
6 number and registration date: R:267274, December
7 5, 1960. RKO claims to have acquired the exclusive
8 right to produce the King Kong photoplay from Edgar
9 Wallace and Merian C. Cooper (the "Wallace/Cooper
10 license").
11

12 Material appearing for the first time in either
13 the Mystery Magazine serialization or the King Kong novel
14 is hereafter referred to as "Old Material". Material which
15 did not appear in the Mystery Magazine serialization or the
16 King Kong novel but which first appeared in the King Kong
17 photoplay is hereafter referred to as "New Material".
18 Substantially all of the material in the King Kong photo-
19 play is Old Material.
20

21 8. Edgar Wallace died February 10, 1932, prior
22 to publication and copyrighting of either the Old Material
23 or the New Material.
24

25 9. The Grosset & Dunlap copyright in the King Kong
26 novel expired on December 28, 1960 without any action on the
27 part of Grosset & Dunlap, Inc. to renew any rights therein.
28 Within the year prior to expiration of the Grosset & Dunlap
29 copyright, Patricia Marion Caldecott Frere ("Frere"),
30 daughter of Edgar Wallace, filed an application for renewal
31 of the Grosset & Dunlap copyright (claiming as the pro-
32 prietor of a posthumous work) and a renewal copyright

1 certificate (the "Frere renewal copyright") was issued
2 to her on February 2, 1960, with the following identifica-
3 tion number: R:251390. A copy of the Frere renewal copy-
4 right is attached hereto as Exhibit "1".

5

6 10. Universal is informed and believes and on
7 that ground alleges that Frere assigned all of her right,
8 title and interest in and to the Frere renewal copyright
9 to Merian C. Cooper in or about September, 1964, pursuant to
10 written assignment (the "Frere/Cooper assignment"). The
11 Frere/Cooper assignment was filed with the Register of
12 Copyrights on October 16, 1964, and a copy thereof is
13 attached hereto as Exhibit "2". Merian C. Cooper died
14 April 21, 1973, a resident of San Diego County, California.
15 He was survived by his widow, Dorothy Cooper, and by his
16 son, the defendant Richard Cooper. On August 12, 1975,
17 Dorothy Cooper quitclaimed all of her right, title and
18 interest in and to the Frere renewal copyright to Richard
19 Cooper, a copy of which is attached hereto as Exhibit "3".
20

21 11. The Frere renewal copyright is invalid and
22 of no force or effect in that at the time Frere filed the
23 renewal copyright application Frere was not the copyright
24 proprietor of the Grosset & Dunlap copyright, nor did she
25 have the right to renew such copyright. Accordingly, since
26 no action was taken by a party entitled thereto to renew
27 the rights, if any, under the Grosset & Dunlap copyright,
28 all material contained in the King Kong novel (i.e., the Old
29 Material) is in the public domain and not protected by a
30 federal statutory copyright. Moreover, since no action was
31 taken by anyone to renew the copyright in the Mystery
32 Magazine serialization, all material contained therein is

1 in the public domain. Thus, the Old Material in its entirety
2 is in the public domain and not protected by a federal
3 statutory copyright.

4
5 12. RKO claims to have the sole and exclusive
6 right to produce, sell, distribute and exhibit, and to
7 license to others the right to produce, sell, distribute
8 and exhibit motion picture photoplays which are based upon
9 either the Old Material or the New Material. Universal is
10 informed and believes and on that ground alleges that RKO
11 has entered into an agreement with DeLaurentiis pursuant
12 to which RKO purportedly granted to DeLaurentiis, and
13 DeLaurentiis is claiming, the exclusive right to produce
14 a motion picture photoplay based upon either the Old Material
15 or New Material.

16
17 13. Universal plans and desires to produce, sell,
18 distribute and exhibit throughout the world a motion picture
19 photoplay based primarily upon the Old Material contained
20 in the Mystery Magazine serialization or the King Kong novel,
21 and not based upon or utilizing the New Material, if any,
22 contained in the King Kong photoplay. Universal has expended
23 time, money and effort in furtherance of such plans and is
24 actively planning to commence the production of such a
25 photoplay.

26
27 14. By reason of the foregoing facts, an actual
28 and justiciable controversy has arisen and now exists be-
29 tween Universal and the defendants concerning the validity
30 of the Frere renewal copyright and the right of Universal
31 to produce, sell, distribute and exhibit a motion picture
32 photoplay based on the Old Material, in that,

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1 14.1 Universal contends:

2 14.1.1 that the alleged Frere renewal
3 copyright is invalid and void;

4 14.1.2 that the Mystery Magazine serializa-
5 tion and the King Kong novel and all the Old
6 Material contained therein are in the public
7 domain; and

8 14.1.3 that Universal may produce, sell,
9 distribute and exhibit a motion picture photo-
10 play based primarily on the Old Material contained
11 in the Mystery Magazine serialization and the
12 King Kong novel, as long as it does not contain
13 New Material, if any, from the King Kong photo-
14 play; and such a motion picture photoplay
15 produced by Universal will not infringe upon the
16 claimed rights of defendants, or any of them, in
17 the King Kong photoplay, or any alleged rights in
18 the King Kong novel, or any other alleged rights
19 of defendants.
20

21 14.2 Defendants dispute and deny Universal's
22 contentions and contend, among other things, that any
23 such motion picture photoplay produced by plaintiff,
24 even if it is based solely on the Old Material con-
25 tained in the Mystery Magazine serialization and King
26 Kong novel, will constitute an infringement of
27 defendants' alleged rights in the King Kong photoplay
28 and King Kong novel and alleged copyrights therein.
29

30 WHEREFORE, plaintiff prays for judgment against
31 the defendants, and each of them, as follows:

32 1. For a declaration that the alleged Frere

1 renewal copyright is invalid and void; that the Mystery
2 Magazine serialization and the King Kong novel and all
3 the Old Material contained therein are in the public domain;
4 and that Universal may produce, sell, distribute and exhibit
5 a motion picture photoplay based primarily on the Old Material
6 contained in the Mystery Magazine serialization and the King
7 Kong novel, as long as it does not contain any New Material
8 from the King Kong photoplay; and such a motion picture photo-
9 play produced by Universal will not infringe upon the claimed
10 right of defendants, or any of them, in the King Kong photo-
11 play, or any alleged rights in the King Kong novel, or any
12 other alleged rights of defendants;

13
14 2. For costs of suit incurred herein; and

15
16 3. For such other and further relief as the
17 Court deems just and proper.

18
19 DATED: October 17, 1975.

20 GANG, TYRE & BROWN
21 BRUCE M. RAMER
22 STANLEY P. GOLD

23 By Stanley P. Gold

24 and

25 ROSENFELD, MEYER & SUSMAN
26 ALLEN E. SUSMAN
27 STEPHEN A. KROFT

28 By Allen E. Susman

29 Attorneys for Plaintiff
30
31
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IN THE DISTRICT COURT OF THE UNITED STATES
CENTRAL DISTRICT OF CALIFORNIA

UNIVERSAL CITY STUDIOS, INC.,)
a corporation,)

NO. CV 75-3526 R

Plaintiff,)

ANSWER OF DEFENDANT RKO
GENERAL, INC.

vs.)

RKO GENERAL, INC., a corpora-)
tion, DINO DeLAURENTIIS)
CORPORATION, a corporation,)
and RICHARD COOPER,)

Defendants.)

Defendant RKO GENERAL, INC., a corporation, answers as
follows:

1. Defendant admits the allegations of Paragraph 1.
2. Defendant admits the allegations of Paragraph 2.
3. Answering Paragraph 3, defendant denies its prin-
cipal place of business is in Los Angeles County, California and
admits the remaining allegations.
4. Defendant admits the allegation of Paragraph 4.
5. Answering Paragraph 5, defendant denies that
Marian C. Cooper was a "writer" of the novel entitled "King
Kong"; except as herein expressly admitted, this defendant
alleges it has no information or belief sufficient to enable it
to answer the remaining allegations contained therein and, basing
its denial on that ground, denies generally and specifically,

1 each and every, all and singular, said remaining allegations.

2 6. Defendant admits the allegations of Paragraph 6.

3 7. Answering Paragraph 7, defendant denies that there
4 is such a thing as "the King Kong story" which is separate and
5 apart from the copyrighted motion picture photoplay entitled KING
6 KONG, and alleges that it is the proprietor of all copyright and
7 other rights in and arising from said photoplay and each component
8 part thereof, which rights are valid and subsisting. Save and
9 except as hereinabove expressly denied and alleged, this defendant
10 denies generally and specifically, each and every, all and singular,
11 said remaining allegations.

12 8. Answering Paragraph 8, defendant admits that Edgar
13 Wallace died February 10, 1932. Save and except as hereinabove
14 expressly denied and alleged, this defendant denies generally and
15 specifically, each and every, all and singular, said remaining
16 allegations.

17 9. Answering Paragraph 9, defendant admits that Pat-
18 ricia Marion Caldecott Frere, a daughter of Edgar Wallace, filed
19 said application for, and received, said renewal copyright. Save
20 and except as hereinabove expressly denied and alleged, this defen-
21 dant denies generally and specifically, each and every, all and
22 singular, said remaining allegations.

23 10. Answering Paragraph 10, defendant alleges it has
24 no information or belief sufficient to enable it to answer the
25 allegations contained therein and, basing its denial on that
26 ground, denies generally and specifically, each and every, all
27 and singular, said allegations.

28 11. Answering Paragraph 11, defendant alleges it has
29 no information or belief sufficient to enable it to answer the
30 allegations contained therein and, basing its denial on that
31 ground, denies generally and specifically, each and every, all
32 and singular, said allegations.

1 12. Answering Paragraph 12, defendant denies the
2 alleged distinction between "old material" and "new material",
3 and the alleged premises thereof, and alleges that it is the
4 copyright proprietor of the motion picture photoplay KING KONG
5 and other rights in and arising therefrom, and as such is entitled
6 to all rights conferred upon a copyright proprietor of a motion
7 picture photoplay by the Copyright Law of the United States, 17
8 U.S.C. §1 et seq., undiminished by the fact that copyrights in
9 works derived therefrom may or may not have been renewed. Defen-
10 dant further admits that it has entered into an agreement with
11 DeLaurentiis authorizing DeLaurentiis to produce and distribute a
12 motion picture which will be a new version or remake of said
13 motion picture photoplay entitled KING KONG. Save and except as
14 herein expressly denied or alleged, defendant alleges it has no
15 information or belief sufficient to enable it to answer the
16 remaining allegations contained therein, and, basing its denial
17 on that ground, denies generally and specifically, each and
18 every, all and singular, said remaining allegations.

19 13. Answering Paragraph 13, defendant admits that Uni-
20 versal has announced, or made known publicly, plans to make motion
21 picture based upon KING KONG. Save and except as expressly
22 admitted, defendant alleges it has no information or belief
23 sufficient to enable it to answer the allegations contained
24 therein and, basing its denial on that ground, denies generally
25 and specifically, each and every, all and singular, said allega-
26 tions.

27 14. Answering Paragraph 14, defendant admits that
28 plaintiff has created a controversy by contending that it is
29 entitled to produce and distribute a motion picture photoplay
30 which is, or will be, a copy of, and will infringe upon this de-
31 fendant's copyright and other related rights, all with respect to
32 its copyrighted motion picture photoplay entitled KING KONG, and

1 further, admits that plaintiff is making the contentions set
2 forth in Paragraphs 14.1.1, 14.1.2 and 14.1.3 of the Complaint,
3 and further, admits that defendant urges upon the Court that
4 plaintiff is not entitled to infringe upon or compete unfairly
5 with its copyright or related rights in and to the motion picture
6 photoplay entitled KING KONG. Save and except as hereinabove
7 expressly denied and alleged, this defendant denies generally and
8 specifically, each and every, all and singular, said remaining
9 allegations.

10 FIRST DEFENSE

11 1. Plaintiffs' complaint fails to state a claim upon
12 which relief can be granted.

13 SECOND DEFENSE

14 1. The within action is not a proper action for
15 declaratory relief in that, regardless of which of the parties'
16 contentions are valid, it will be impossible to finally adjudicate
17 plaintiff's alleged right to produce, distribute and exhibit
18 any motion picture containing or purporting to contain all or any
19 part of the story or character of KING KONG until such motion
20 picture has been completed and is in such form as may be viewed
21 by the Court and compared by the Court to defendant's copyrighted
22 motion picture photoplay entitled KING KONG.

23 THIRD DEFENSE

24 1. Plaintiff is a stranger to the copyright in any
25 of the various copyrighted KING KONG works, and in particular
26 said copyrighted motion picture photoplay, and therefore it lacks
27 standing to bring the within action.

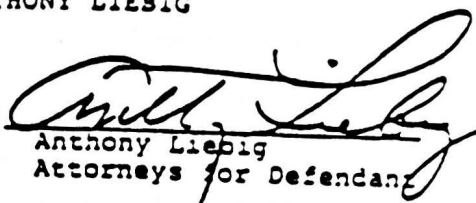
28 WHEREFORE, defendant RKO GENERAL, INC. prays for judgment
29 as follows:

- 30 1. For judgment that the Complaint be dismissed;
31 2. For its cost of suit incurred herein together
32 with its reasonable attorneys' fees as provided by law; and

1 3. For such other and further relief as to the
2 Court may seem proper.

3 November 19, 1975

4 LILLYCK McHOSE & CHARLES
5 ANTHONY LIEBIG

6
7 By: 

8 Anthony Liebig
9 Attorneys for Defendant

10
11 I hereby attest and certify on 31 AUG 1982
12 that the foregoing document is a full true and correct
13 copy of the original as it is in my office, and in my
14 legal custody

15 CLERK U.S. DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA



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FILED

NO. 18 1975

CLERK OF DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
JAN 14 1975

IN THE DISTRICT COURT OF THE UNITED STATES
CENTRAL DISTRICT OF CALIFORNIA

UNIVERSAL CITY STUDIOS, INC.,
a corporation,

Plaintiff,

vs.

RKO GENERAL, INC., a corporation,
DINO DeLAURENTIIS CORPORATION, a
corporation, and RICHARD COOPER,

Defendants.

NO. CV 75-3526 R

COUNTERCLAIM OF DEFENDANT
RKO GENERAL, INC.

RKO GENERAL, INC., a corporation,

Defendant and Counter-
Claimant,

vs.

UNIVERSAL CITY STUDIOS, INC.,
a corporation,

Defendant and Counter-
Defendant.

Defendant RKO GENERAL, INC., counter-claims against
plaintiff, UNIVERSAL STUDIOS, INC. as follows:

FIRST COUNT

1. This action arises under the copyright law of the
United States, Title 17, United States Code §§ 1 et seq., both as
a claim for infringement and as a substantial and related claim
for unfair competition. Jurisdiction is conferred by Title 28
United States Code §1338(a) and (b).

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1 2. Defendant and Counterclaimant RKO GENERAL INC.
2 ("RKO") and plaintiff UNIVERSAL CITY STUDIOS ("UNIVERSAL") are
3 both corporations organized and existing under and by virtue of
4 the laws of the State of Delaware and qualified to do, and doing,
5 business in the State of California.

6 3. RKO is copyright proprietor of the motion picture
7 photoplay entitled KING KONG, being the successor in interest of
8 RKO Radio Pictures, Inc., which created and produced the same and
9 registered it for copyright following publication February 24,
10 1933 under Registration No. L. 3794 and thereafter on December 5,
11 1960, applied for Renewal Copyright under No. R 267274. Attached
12 hereto marked Exhibits "1" and "2", respectively, are Certified
13 Copies of the Certificate of Copyright Registration and Certifi-
14 cate of Registration of a claim to Renewal Copyright of KING
15 KONG.

16 4. UNIVERSAL has publicly announced, stated and
17 represented, in the press, in these proceedings, and elsewhere,
18 that it plans and intends to produce, sell, distribute, and
19 exhibit throughout the world, a motion picture photoplay slavishly
20 copying RKO's said copyrighted motion picture photoplay KING
21 KONG, featuring the character KING KONG, and utilizing the name
22 KING KONG as the title or part of the title thereof. RKO has
23 duly objected to said plans of UNIVERSAL, but to the best of
24 RKO's information and belief, UNIVERSAL is going forward with
25 said production.

26 5. If UNIVERSAL produces a motion picture photoplay
27 which infringes RKO's said copyright in KING KONG and thereafter
28 proceeds to distribute or exhibit the same, it will be liable to
29 RKO for damages, injunctive relief, and other sanctions under
30 Title 17 U.S. Code §§1 et seq.

31 SECOND COUNT

32 6. RKO refers to Paragraphs 1 through 5 of its First

1 Count herein and incorporates the same as though fully set forth.

2 7. RKO has entered into a written agreement with
3 defendant DINO DeLAURENTIIS CORPORATION ("DeLAURENTIIS") exclu-
4 sively licensing it to produce and distribute a new version, or
5 remake, of KING KONG in consideration of a percentage of the
6 gross receipts from the exhibition thereof.

7 8. By issuing said announcements, statements, and
8 representations, UNIVERSAL: has slandered and called into
9 question RKO's rights in its said copyrighted motion picture
10 photoplay and the component parts and title thereof; has diluted
11 the RKO's rights and the value thereof in said copyrighted motion
12 picture photoplay, the title thereof, and the character KING
13 KONG; and has interfered with RKO's prospective economic advan-
14 tage under said written agreement with DeLAURENTIIS, all to RKO's
15 damage in a sum as yet unascertained but believed to be in excess
16 of \$5,000,000.00.

17 9. If UNIVERSAL is not enjoined from continuing to
18 make such announcements, statements, and misrepresentations,
19 RKO's said rights will be further demeaned and diluted and its
20 prospective economic advantage further diminished, all to its
21 irreparable injury.

22 10. There is no adequate or available remedy, other
23 than injunction, to prevent said continuing irreparable injuries.

24 WHEREFORE, Defendant RKO GENERAL prays for judgment
25 against plaintiff UNIVERSAL CITY STUDIOS, INC., as follows:

26 1. That UNIVERSAL be enjoined, both preliminarily
27 and permanently, from producing and distributing for exhibi-
28 tion any motion picture photoplay which infringes RKO's said
29 copyright.

30 2. That UNIVERSAL be enjoined, both preliminarily and
31 permanently, from making any announcements, representations,
32 promotional or other statements representing that it is

1 entitled to make, is making, and/or will produce or distri-
2 bute any motion picture photoplay utilizing or containing
3 the story of KING KONG and/or the character or title KONG or
4 KING KONG.

5 3. For damages in a sum in excess of \$5,000,000.00.

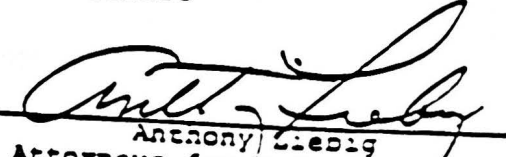
6 4. For costs of suit herein including reasonable
7 attorneys' fees.

8 5. For such other relief as the court may deem
9 proper.

10 DATED: November 19, 1975.

11 LILLYCK McHOSE & CHARLES
12 ANTHONY LIEBIG

13
14 By:


15 Anthony Liebig
16 Attorneys for Defendant and
17 Counterclaimant RKO GENERAL, INC.
18
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COPYRIGHT OFFICE OF THE UNITED STATES OF AMERICA

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CERTIFICATE OF COPYRIGHT REGISTRATION

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright, approved March 4, 1909, as amended by the Act approved March 2, 1913, that TWO copies of the photoplay named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of twenty-eight years for said work has been duly made in the name of

RKO Radio Pictures, Inc.,
1270 Sixth Ave.,
New York, N.Y.

Title: King Kong. A Merian C. Cooper and Ernest B. Schoedsack production.
From an idea conceived by Edgar Wallace and Merian C. Cooper.
Screenplay by James Creelman and Ruth Rose. Author of photoplay,
RKO Radio Pictures, Inc., of U.S.

Date of publication in the United States Feb. 24 1933.

Copies received Apr. 11 1933

(SEAL)

Barbara Ringer
REGISTER OF COPYRIGHTS

CCB 1
(Jan. 1973-1,000)

25

26

27

28

29

30

31

32

EXHIBIT 1

A002057⁵

1 GANG, TYRE & BROWN
2 BRUCE M. RAMER
3 STANLEY P. GOLD
4 6400 Sunset Building
5 Los Angeles, California 90028
6 (213) 463-4863
7 and
8 ROSENFELD, MEYER & SUSMAN
9 ALLEN E. SUSMAN
10 STEPHEN A. KROFT
11 9601 Wilshire Blvd., Suite 444
12 Beverly Hills, California 90210
13 (213) 271-9144
14 Attorneys for Plaintiff

15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA

17 UNIVERSAL CITY STUDIOS, INC.,
18 a corporation,

19 Plaintiff,

20 vs.

21 RKO GENERAL, INC., a corporation,
22 DINO DeLAURENTIIS CORPORATION, a
23 corporation, and RICHARD COOPER,

24 Defendants.

NO. CV 75-3526 R

REPLY OF PLAINTIFF
UNIVERSAL CITY STUDIOS,
INC. TO COUNTERCLAIM
OF RKO GENERAL, INC.

25 RKO GENERAL, INC., a corporation,

26 Defendant and Counter-
27 Claimant,

28 vs.

29 UNIVERSAL CITY STUDIOS, INC., a
30 corporation,

31 Plaintiff and Counter-
32 Defendant.

33 Plaintiff and counter-defendant UNIVERSAL CITY
34 STUDIOS, INC. ("counter-defendant") in reply to Counterclaim
35 of defendant and counter-claimant RKO GENERAL, INC. ("RKO")
36 admits, denies and alleges as follows:

37 ///

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39 ///

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1
2 REPLY TO FIRST COUNT

3 1. Answer Paragraph 1, counter-defendant admits
4 the allegations thereof, but denies the claims of copyright
5 infringement and unfair competition thereof.

6 2. Answering Paragraph 2, counter-defendant admits
7 the allegations thereof.

8 3. Answering Paragraph 3, counter-defendant admits
9 that Exhibit "1" is a true and correct copy of United States
10 Certificate of Copyright Registration No. L 3794, and that
11 Exhibit "2" is a true and correct copy of Certificate of
12 Registration of Claim to Renewal Copyright No. R 267274.
13 Except as herein specifically admitted, counter-defendant
14 denies each and every allegation thereof.

15 4. Answering Paragraph 4, counter-defendant
16 alleges that it has announced in the press and in these pro-
17 ceedings that it plans and intends to produce, sell, distribute
18 and exhibit throughout the world a motion picture photoplay
19 based in part upon the novel "KING KONG" and the Mystery
20 Magazine serialization entitled "KING KONG" featuring the
21 character King Kong and utilizing the name "KING KONG" as
22 part of the title thereof, and further alleges that it has
23 the legal right to so do. Except as specifically alleged
24 herein, counter-defendant denies each and every allegation
25 thereof.

26 5. Answering Paragraph 5, counter-defendant
27 denies each and every allegation thereof.

28 REPLY TO SECOND COUNT

29 6. Answering Paragraph 6, counter-defendant hereby
30 incorporates by reference all of the denials, allegations
31 and admissions as set forth in its answers to Paragraphs 1
32 through 5 above, as though the same were fully set forth herein.

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1' ///

2 7. Answering Paragraph 7, counter-defendant is
3 informed and believes and on that ground alleges that RKO
4 has purported to enter into an agreement with DINO DeLAURENTIIS
5 CORPORATION, pursuant to which RKO purportedly granted to said
6 corporation the exclusive right to produce a motion picture
7 photoplay based upon RKO's motion picture photoplay entitled
8 "KING KONG". Except as otherwise admitted or alleged herein,
9 counter-defendant denies each and every allegation thereof,
10 and affirmatively alleges that any such purported agreement
11 between RKO and DINO DeLAURENTIIS CORPORATION is invalid and
12 unenforceable insofar as it or any of its terms purports to
13 prevent or prohibit counter-defendant from pursuing its
14 plans and intentions as set forth in its Complaint on file
15 herein.

16 8. Answering Paragraph 8, counter-defendant denies
17 each and every allegation thereof and specifically denies that
18 RKO has been damaged in the amount of \$5,000,000, or in any
19 sum whatsoever, or at all.

20- 9. Answering Paragraph 9, counter-defendant denies
21 each and every allegation thereof.

22 10. Answering Paragraph 10, counter-defendant denies
23 each and every allegation thereof.

24

25 WHEREFORE, counter-defendant UNIVERSAL CITY STUDIOS,
26 INC. prays for judgment against counter-claimant RKO GENERAL,
27 INC., as follows:

28 1. For an Order dismissing the Counterclaim and
29 ordering that counter-claimant take nothing thereby;

30 2. For costs of suit, including reasonable
31 attorneys' fees; and

32 ///

A002062

1 3. For such other and further relief as the
2 Court deems just and proper.

3
4 DATED: December 16, 1975.
5

6 GANG, TYRE & BROWN
7 BRUCE M. RAMER
8 STANLEY P. GOLD

9 By Stanley P. Gold
10

11 ROSENFELD, MEYER & SUSMAN
12 ALLEN E. SUSMAN
13 STEPHEN A. KROFT

14 By Stephen A. Kroft
15

16 Attorneys for Plaintiff and
17 Counter-Defendant UNIVERSAL
18 CITY STUDIOS, INC.
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A002063

MITCHELL, SILBERBERG & KNUPP
ARTHUR GROMAN
D. W. HUNT
1800 Century Park East
Los Angeles, California 90067
(213) 553-5000

Attorneys for Defendant
Dino De Laurentiis Corporation

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNIVERSAL CITY STUDIOS, INC.,

Plaintiff,

vs.

RKO GENERAL, INC., a corporation,
DINO DE LAURENTIIS CORPORATION, a
corporation, and RICHARD COOPER,

Defendants.

NO. CV 75-3526 R

ANSWER OF DEFENDANT DINO
DE LAURENTIIS CORPORATION

TO COMPLAINT,

Defendant Dino De Laurentiis Corporation, answering
for itself and no other defendant herein, admits, denies, and
alleges as follows:

1. Answering defendant admits the allegations of
paragraph 1.

2. Answering defendant has no information or belief
sufficient to enable it to answer the allegations contained in
paragraph 2 and, basing its denial on that ground, denies generally
and specifically each and every allegation contained therein,
except insofar as said matters are of public record.

///

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A002064

1 3. Answering the allegations contained in paragraph 3,
2 answering defendant is informed and believes and based thereon
3 alleges that defendant RKO General, Inc. ("RKO") is the successor
4 in interest to RKO Radio Pictures, Inc. Except as herein
5 specifically alleged, answering defendant has no information or
6 belief sufficient to enable it to answer the allegations contained
7 in said paragraph and, basing its denial on that ground, denies
8 generally and specifically each and every allegation contained
9 therein, except insofar as said matters are of public record.

10
11 4. Answering the allegations contained in paragraph 4,
12 answering defendant admits that it is a corporation organized
13 and existing under the laws of Delaware, that as of July 1, 1975,
14 it was qualified to do and was transacting business in the State
15 of California, and that its principal place of business is in the
16 County of Los Angeles. Except as herein specifically admitted,
17 answering defendant denies generally and specifically each and
18 every allegation contained in said paragraph.

19
20 5. Answering defendant has no information or belief
21 sufficient to enable it to answer the allegations contained in
22 paragraph 5 and, basing its denial on that ground, denies
23 generally and specifically each and every allegation contained
24 therein.

25
26 6. Answering defendant has no information or belief
27 sufficient to enable it to answer the allegations contained in
28 paragraph 6 and, basing its denial on that ground, denies
29 generally and specifically each and every allegation contained
30 therein.

31 / / /

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32 / / /

1 7. Answering the allegations contained in paragraph 7,
2 answering defendant is informed and believes and based thereon
3 alleges that at all times material hereto, all copyrights and
4 other legal rights in and to the name, character, title, and
5 story "King Kong" are and were owned solely and exclusively by
6 defendant RKO, except insofar as they have been licensed by RKO.
7 Except as herein specifically alleged, answering defendant has
8 no information or belief sufficient to enable it to answer the
9 allegations contained in said paragraph and, basing its denial
10 on that ground, denies generally and specifically each and every
11 allegation contained therein, except insofar as said matters are
12 of public record.
13

14 8. Answering defendant has no information or belief
15 sufficient to enable it to answer the allegations contained in
16 paragraph 8 and, basing its denial on that ground, denies
17 generally and specifically each and every allegation contained
18 therein.
19

20 9. Answering defendant has no information or belief
21 sufficient to enable it to answer the allegations contained in
22 paragraph 9 and, basing its denial on that ground, denies
23 generally and specifically each and every allegation contained
24 therein, except insofar as said matters are of public record.
25

26 10. Answering defendant has no information or belief
27 sufficient to enable it to answer the allegations contained in
28 paragraph 10 and, basing its denial on that ground, denies
29 generally and specifically each and every allegation contained
30 therein, except insofar as said matters are of public record.
31 ///
32 ///

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1 11. Answering defendant has no information or belief
2 sufficient to enable it to answer the allegations contained in
3 paragraph 11 and, basing its denial on that ground, denies
4 generally and specifically each and every allegation contained
5 therein.

6
7 12. Answering the allegations contained in paragraph 12,
8 answering defendant is informed and believes and based thereon
9 alleges that at all times material hereto, all copyrights and
10 other legal rights in and to the name, character, title, and
11 story "King Kong" are and were owned solely and exclusively
12 by defendant RKO. Answering defendant further alleges that it
13 has entered an agreement with defendant RKO pursuant to which
14 RKO undertook to grant answering defendant and answering defendant
15 purchased an exclusive license to produce, sell, and distribute
16 a remake of RKO's motion picture photoplay entitled "King Kong."
17 Pursuant to said license, answering defendant claims said exclusive
18 rights to produce, sell, and distribute said photoplay. Except
19 as herein specifically alleged, answering defendant has no infor-
20 mation or belief sufficient to enable it to answer the allegations
21 contained in said paragraph and, basing its denial on that ground,
22 denies generally and specifically each and every allegation con-
23 tained therein.

24
25 13. Answering the allegations contained in paragraph 13,
26 answering defendant is informed and believes and based thereon
27 alleges that plaintiff has publicly announced its intention to
28 make a motion picture using the title and character "King Kong."
29 Except as herein specifically alleged, answering defendant has no
30 information or belief sufficient to enable it to answer the

31 / / /

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A002067-4-

1 allegations contained in said paragraph and, basing its denial
2 on that ground, denies generally and specifically each and every
3 allegation contained therein.

4
5 14. Answering the allegations contained in paragraph 14,
6 answering defendant claims and contends:

7
8 (a) That at all times material hereto, defendant
9 RKO claimed sole and exclusive ownership and copyright
10 in and to the name, character, title, and story "King
11 Kong," including the exclusive rights to produce, sell,
12 and distribute any remake of the motion picture photo-
13 play "King Kong";

14
15 (b) That at all times prior to commencement of the
16 instant action plaintiff admitted and relied upon RKO's
17 said exclusive ownership and copyright and based thereon
18 negotiated with RKO to purchase a license to said rights;

19
20 (c) That on or about May 9, 1975 RKO undertook to
21 grant answering defendant the exclusive right to produce,
22 sell, and distribute a remake of the motion picture
23 photoplay entitled "King Kong";

24
25 (d) That on or about May 30, 1975 plaintiff filed
26 Action No. C 125242 ("Action No. C 125242") in the
27 Superior Court for the State of California, County of
28 Los Angeles against both RKO and answering defendant,
29 which action admitted RKO's said exclusive ownership
30 and copyright described in subparagraph (a) hereinabove

31 / / /

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A002068

1 and which requested, inter alia, a declaration that RKO,
2 based upon its said admitted ownership and copyright,
3 had granted plaintiff an exclusive license to produce,
4 sell, and distribute a remake of said photoplay;
5

6 (e) That plaintiff is not entitled to infringe upon
7 or compete unfairly with RKO's said rights as described
8 in subparagraph (a) hereinabove in and to the motion
9 picture photoplay entitled "King Kong," including those
10 rights licensed to answering defendant as described in
11 subparagraph (c) hereinabove.
12

13 Except as herein specifically alleged, answering defendant denies
14 generally and specifically each and every allegation contained
15 in said paragraph.
16

17 FIRST AFFIRMATIVE DEFENSE
18

19 15. For a first, separate, and affirmative defense
20 to plaintiff's complaint, answering defendant alleges that the
21 complaint fails to state facts sufficient to constitute a claim
22 against answering defendant upon which relief can be granted.
23

24 SECOND AFFIRMATIVE DEFENSE
25

26 16. For a second, separate, and affirmative defense,
27 answering defendant is informed and believes and based thereon
28 alleges:

29 / / /

30 / / /

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A002069

1 (a) That in approximately 1963, plaintiff's
2 predecessor, Universal Pictures Company, Inc., negotiated
3 with and purchased from RKO's predecessor the exclusive
4 right and license to produce, sell, and distribute a
5 motion picture photoplay entitled "King Kong vs. Godzilla"
6

7 (b) That in approximately 1967 and 1968, plaintiff's
8 said predecessor negotiated with and purchased from
9 RKO's said predecessor the exclusive right and license
10 to produce, sell, and distribute two motion picture
11 photoplays entitled "King Kong vs. Godzilla" and "King
12 Kong Escapes";
13

14 (c) That in approximately April 1975, plaintiff
15 negotiated with RKO's agent to purchase the exclusive
16 right and license to produce, sell, and distribute any
17 remake of the motion picture photoplay entitled "King
18 Kong";
19

20 (d) That at all times mentioned herein plaintiff
21 claimed and still claims that on or about April 15, 1975
22 it entered into an oral agreement with defendant RKO
23 pursuant to which RKO allegedly granted plaintiff an
24 exclusive license to produce, sell, and distribute a
25 remake of the motion picture photoplay "King Kong";
26

27 (e) That on or about May 30, 1975 plaintiff filed
28 Action No. C 125242 in the Superior Court for the State
29 of California, County of Los Angeles against both RKO
30 and answering defendant, asserting, inter alia, breach
31
32

///

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A002070

1 and inducement of breach of said alleged oral contract
2 described in subparagraph (d) hereinabove;
3

4 (f) That at all times prior to commencement of
5 the instant action plaintiff admitted and relied upon
6 RKO's sole and exclusive ownership and copyright in
7 and to the name, character, title, and story "King
8 Kong," including the exclusive rights to produce,
9 sell, and distribute, or to license others to produce,
10 sell, and distribute, any remake of the motion picture
11 photoplay entitled "King Kong";
12

13 (g) That at all times material hereto, plaintiff
14 was or should have been on notice of all the alleged
15 facts stated in its complaint in the instant action;
16

17 (h) That at all times after May 30, 1975 plaintiff
18 was or should have been on notice that answering defend-
19 ant was expending both time and money in the making
20 and production of a remake of the motion picture
21 photoplay entitled "King Kong" based upon answering
22 defendant's exclusive license from defendant RKO to do
23 so.
24

25 17. As a result of the foregoing, plaintiff is estopped
26 from seeking any declaration that any of the copyrights claimed
27 by answering defendant or RKO in the said photoplay are not valid
28 or that any remake by plaintiff of said photoplay will not infringe
29 upon the rights of answering defendant or RKO.

30 / / /

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32 / / /

THIRD AFFIRMATIVE DEFENSE

18. Answering defendant refers to and hereby incorporates by reference each and every allegation contained in paragraph 15 hereinabove.

19. As a result of the foregoing, plaintiff has waived any claim for a declaration that any of the copyrights claimed by answering defendant or RKO in the said photoplay are not valid or that any remake by plaintiff of said photoplay will not infringe upon the rights of answering defendant or RKO.

FOURTH AFFIRMATIVE DEFENSE

20. Answering defendant refers to and hereby incorporates by reference each and every allegation contained in paragraph 15 hereinabove.

21. By reason of all the foregoing facts, plaintiff has been guilty of laches and is entitled to no relief whatsoever in this action.

WHEREFORE, defendant Dino De Laurentiis Corporation prays for judgment as follows:

1. That plaintiff take nothing by reason of its complaint herein, and that said complaint be dismissed with prejudice;

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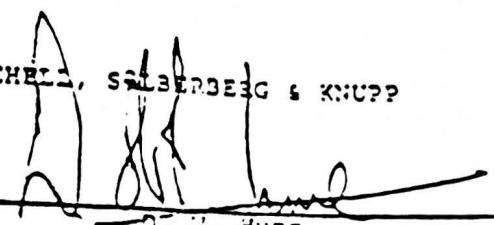
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A002072

1 2. That answering defendant be awarded its costs of
2 suit incurred herein, together with its reasonable attorneys' fees
3 as provided by law, and such other and further relief as to the
4 court may seem proper.

5
6 MITCHELL, SILBERBERG & KNUFF

7
8 By 

9 D. W. Hunt,
10 Attorneys for Defendant Dinc
11 De Laurentiis Corporation
12
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1 MITCHELL, SILBERBERG & KNUPP
2 ARTHUR GROMAN
3 D. W. HUNT
4 1800 Century Park East
5 Los Angeles, California 90067
6 (213) 553-5000
7
8 Attorneys for Defendant
9 Dino De Laurentiis Corporation
10

11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA
13

14 UNIVERSAL CITY STUDIOS, INC.,)
15)
16 Plaintiff,)
17)
18 vs.)
19)
20 RKO GENERAL, INC., et al.,)
21)
22 Defendants.)

NO. CV 75-3526-R

23 _____)
24 RKO GENERAL, INC.,)
25)
26 Counterclaimant,)
27)
28 vs.)
29)
30 UNIVERSAL CITY STUDIOS,)
31)
32 Counterdefendant.)

COUNTERCLAIM OF DEFENDANT
DINO DE LAURENTIIS
CORPORATION

33 _____)
34 DINO DE LAURENTIIS CORPORATION,)
35 INC., a corporation,)
36)
37 Counterclaimant,)
38)
39 vs.)
40)
41 UNIVERSAL CITY STUDIOS, INC.,)
42 a corporation,)
43)
44 Counterdefendant.)

45 ///

46 ///

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1 Defendant Dino De Laurentiis Corporation, for itself and
2 no other party herein, counterclaims against plaintiff Universal
3 City Studios, Inc., as follows:
4

5 FIRST COUNT

6 (Infringement of Statutory Copyright)
7

8 1. This action arises under the Copyright Law of the
9 United States, Title 17 United States Code §§ 1 et seq. as a claim
10 for infringement and substantial and related claims for unfair
11 competition. Jurisdiction is conferred on this Court by Title 28
12 United States Code § 1338.
13

14 2. Defendant and counterclaimant Dino De Laurentiis
15 Corporation ("DDLC") is a corporation duly organized and existing
16 under the laws of Delaware and is qualified to do and is doing
17 business in the County of Los Angeles, State of California. At all
18 times mentioned herein, DDLC was and now is an independent motion
19 picture producer of major stature engaged in the financing, produc-
20 tion, and distribution of theatrical motion pictures. DDLC has a
21 reputation in said industry for producing motion pictures of both
22 great quality and high profitability.
23

24 3. DDLC is informed and believes and based thereon
25 alleges that plaintiff and counterdefendant Universal City Studios,
26 Inc. ("Universal") is a Delaware corporation qualified to do and
27 doing business in the State of California.
28

29 4. DDLC is informed and believes and based thereon
30 alleges that RKO General, Inc. ("RKO"), a defendant and counter-
31 claimant in this action, is a Delaware corporation qualified to do
32

///

1 and doing business in the State of California.

2
3 5. In the year 1933, RKO created and produced an origi-
4 nal motion picture photoplay entitled "King Kong" ("the original
5 photoplay"). DDLC is informed and believes and on that basis
6 alleges that said original photoplay is wholly original with RKO
7 and is copyrightable subject matter under the laws of the United
8 States. Prior to May 9, 1975, RKO complied in all respects with
9 the Copyright Law of the United States and all other laws governing
10 copyrights and secured the exclusive rights and privileges in and
11 to the copyright of said original photoplay and applied for and
12 received from the Register of Copyrights a certificate of registra-
13 tion of a claim to copyright identified as No. L 3794 and, on
14 December 5, 1960, obtained a renewal copyright therein, identified
15 as No. R 267264.

16
17 6. At all times mentioned herein said original photo-
18 play, "King Kong," has been published either by RKO or under its
19 authority and license in conformity with the provisions of the
20 Copyright Law of the United States and all other laws governing
21 copyrights. At all times mentioned herein, and subject to the
22 exclusive license hereinafter set forth, RKO was and still is the
23 sole proprietor of all rights, title and interest in and to the
24 copyright of said original photoplay.

25
26 7. On or about May 9, 1975 DDLC reached an agreement
27 with RKO by which RKO sold and DDLC purchased the exclusive right
28 and license to copy, produce, sell, and distribute a remake of the
29 original photoplay, and to use the name, title, and character

30 ///

31 ///

32 ///

A002076

1 "Kong" or "King Kong" in connection with the production, advertis-
2 ing, and promotion of said remake. Pursuant to and as a part of
3 said license, DDLC obtained and still has the exclusive right to
4 copy the story and expression of the original photoplay in connec-
5 tion with said remake.

6
7 8. Pursuant to its said exclusive license, at all times
8 after May 9, 1975 DDLC has expended and continues to expend con-
9 siderable time and money to remake the original photoplay, utili-
10 zing the name, characters, story, and expression of said original
11 photoplay. At great expense, DDLC has hired a screenwriter, direc-
12 tors, and actors, has released major advertising and publicity, has
13 developed a screenplay, has made film tests, has traveled exten-
14 sively in surveying locations, and has developed "special effects,"
15 all with respect to said production.

16
17 9. At all times mentioned herein Universal knew and was
18 on notice of all of the matters stated in paragraphs 5 through 8
19 inclusive hereinabove.

20
21 10. DDLC is informed and believes and based thereon
22 alleges that after May 9, 1975 Universal caused to be written a
23 screenplay (the "Universal screenplay"), unlawfully copying and
24 infringing upon the copyrighted original photoplay, including its
25 story and expression. Universal has publicly announced its inten-
26 tion to produce, sell, and distribute a remake of the original
27 photoplay based upon said unlawrul screenplay.

28
29 11. Universal's said unlawful acts as alleged herein-
30 above are causing and, unless enjoined and restrained by this

31 ///

32 ///

A002077

1 Court, will continue to cause DDLC great and irreparable injury
2 which cannot be adequately compensated or measured in money. DDLC
3 has no adequate remedy at law. Pursuant to 17 U.S.C. § 101(a) and
4 § 112, DDLC is entitled to preliminary and permanent injunctions
5 restraining and enjoining Universal's infringement of copyright.

6
7 12. As a direct and proximate result of Universal's said
8 unlawful acts as alleged hereinabove, DDLC has suffered damages in
9 an amount which it cannot now ascertain. DDLC is informed and
10 believes, and based thereon alleges, that it has suffered such
11 damages in an amount of not less than \$40,000,000. Pursuant to
12 17 U.S.C. § 101(b) DDLC is entitled to recover from Universal such
13 damages as DDLC has suffered by reason of Universal's infringement
14 of copyright, as well as all profits which Universal may have or
15 shall derive as a result of said infringement. DDLC will seek
16 leave to amend this complaint to allege the specific amount of
17 such damages when such amount has been ascertained.

18
19 13. By virtue of Universal's said unlawful acts,
20 Universal has been guilty of oppression, fraud, and malice and
21 DDLC, in addition to its actual damages, is entitled by reason
22 thereof to recover \$50,000,000 in damages for the sake of example
23 and by way of punishing Universal.

24
25 14. Pursuant to 17 U.S.C. § 101(c) and § 101(d), DDLC
26 is entitled to an order of this Court requiring Universal to de-
27 liver up on oath to be impounded during the pendency of this action,
28 and to be destroyed upon such terms and conditions as this Court
29 may prescribe, all materials which infringe upon the copyright in

30 ///

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A002078

1 the original photoplay "King Kong."
2

3
4 15. Pursuant to 17 U.S.C. § 116, DDLC is entitled to
5 recover, in addition to all of its monetary recovery, its reason-
6 able attorneys' fees incurred in commencing and prosecuting this
7 counterclaim. DDLC has employed attorneys to represent it in this
8 action and has incurred and will incur in the future, expenses for
9 attorneys' fees and other costs in connection with this action.
10 DDLC will ask leave of this Court to amend this complaint to
11 allege the exact amount of said attorneys' fees, costs, and ex-
12 penses when said amount has been fully ascertained.

13
14 SECOND COUNT

15 (Unfair Competition)

16 . . .
17 16. DDLC refers to and herein incorporates by reference
18 each and every allegation contained in paragraphs 1 through 10 in-
19 clusive hereinabove.

20
21 17. At all times mentioned herein the reputation of the
22 original photoplay and the name and visual depiction of the char-
23 acter "Kong" or "King Kong" was and still is widely known by the
24 public both in the United States and abroad. At all times since
25 its original release in 1933 the original photoplay has been avail-
26 able for commercial public viewing, either in motion picture
27 theatres or on television, and has received and continues to re-
28 ceive considerable critical acclaim and financial success. DDLC is
29 informed and believes and based thereon alleges that at all times
30 since the original release of the original photoplay, RKO has

31 ///

32 ///

///

A002079

1 regularly licensed the use of the title "King Kong" and the name
2 and visual depiction of "Kong" or "King Kong," for commercial
3 value, including licenses to plaintiff for two separate motion
4 pictures using the name, title, and character "King Kong" or "Kong."
5 As a result of said critical acclaim and widespread recognition,
6 the reputation of the original photoplay, including the public
7 recognition and good will attaching to it, the title "King Kong,"
8 and the name and visual depiction of the character "Kong" or "King
9 Kong" have acquired a secondary meaning of substantial commercial
10 value.

11
12 18. The Universal screenplay unlawfully appropriates
13 said title, reputation, name, and visual depiction. In addition,
14 Universal, in order to profit from said unlawful appropriation, has
15 publicly advertised and will in the future cause to be issued ad-
16 vertisements concerning its intention to produce, under its own
17 name, a remake of the original photoplay. Each said advertisement
18 and press release either visually depicts the character "King
19 Kong" or "Kong" or refers to that title, name, or character.
20 Universal has thereby appropriated, continues to appropriate, and
21 will in the future appropriate the name, title, visual depiction,
22 reputation, public recognition, and good will accorded the original
23 photoplay and the fruit of RKO's work, expenditures, skills, ex-
24 perience, and knowledge, all of which are the exclusive property
25 of DDLC by virtue of the license described in paragraph 7 above.
26 Universal has paid nothing and its said unlawful appropriation
27 is without any license, consent, or authority from DDLC or RKO or
28 any other person who may lawfully give such license, consent, or
29 authority.

30 ///

31 ///

32 ///

A002080

1 19. The Universal screenplay and Universal's said ad-
2 vertisements and press releases are calculated, designed, intended,
3 and do cause confusion as to the identity and content of both the
4 original photoplay and the remake now in production by DDLC and as
5 to the ownership of the name, visual depiction of the character
6 "Kong" or "King Kong," and the reputation, public recognition, and
7 good will accorded the original photoplay. Said advertisements
8 and press releases unlawfully and wrongfully use and trade upon
9 said name, and visual depiction, reputation, public recognition,
10 and good will, and constitute a wrongful, unlawful, unjust, and
11 unconscionable appropriation and taking by Universal for its own
12 use of said property.
13

14 20. The screenplay and photoplay which is now in produc-
15 tion by DDLC is of the highest quality and utilizes special effects
16 which have been developed and perfected at great expense to DDLC.
17

18 21. By virtue of Universal's said unlawful acts, Univer-
19 sal has or will unjustly enrich itself at the expense of DDLC.
20 Said acts defraud and cheat DDLC, constitute an appropriation and
21 invasion of DDLC's property rights, jeopardize the reputation of
22 DDLC as a producer of quality motion pictures, and constitute un-
23 fair competition with DDLC.
24

25 22. Universal's said unlawful acts as alleged hereinabove
26 are causing and, unless enjoined and restrained by this Court, will
27 continue to cause DDLC great and irreparable injury which cannot
28 be adequately compensated or measured in money. DDLC has no ade-
29 quate remedy at law.

30 ///

31 ///

32 ///

A002081

1 23. As a direct and proximate result of Universal's
2 unlawful acts as alleged hereinabove, DDLC has suffered damages
3 in an amount which it cannot now ascertain. DDLC is informed and
4 believes, and based thereon alleges, that it has suffered such
5 damages in an amount of not less than \$40,000,000. DDLC will seek
6 leave to amend this complaint to allege the specific amount of
7 such damages when such amount has been ascertained.

8
9 24. By virtue of Universal's said unlawful acts,
10 Universal has been guilty of oppression, fraud, and malice and
11 DDLC, in addition to its actual damages, is entitled by reason
12 thereof to recover \$50,000,000 in damages for the sake of example
13 and by way of punishing Universal.

14
15 THIRD COUNT

16 (Interference with Prospective Advantage)

17
18 25. DDLC refers to and herein incorporates by reference
19 each and every allegation contained in paragraphs 1 through 10 in-
20 clusive and 17 through 20 inclusive hereinabove.

21
22 26. By reason of the license described in paragraph 7
23 above, DDLC is in a position to realize substantial future economic
24 benefits from distribution or sale of its remake of the original
25 photoplay. By virtue of Universal's unlawful acts as described
26 hereinabove, Universal is unlawfully interfering with the prospec-
27 tive business interests and advantages of DDLC.

28
29 27. As a direct and proximate result of Universal's said
30 ///

31 ///

32 ///

A002082

1 unlawful acts, DDLC will suffer damages in an amount which it can-
2 not now ascertain. DDLC is informed and believes and based thereon
3 alleges that it will suffer such damages in an amount of not less
4 than \$40,000,000. DDLC will seek leave to amend this complaint
5 to allege the specific amount of such damages when such amount has
6 been ascertained.

7
8 28. By virtue of Universal's said unlawful acts,
9 Universal has been guilty of oppression, fraud, and malice and
10 DDLC, in addition to its actual damages, is entitled by reason
11 thereof to recover \$50,000,000 in damages for the sake of example
12 and by way of punishing Universal.

13
14 FOURTH COUNT

15 (Constructive Trustee)

16
17 29. DDLC refers to and herein incorporates by reference
18 each and every allegation contained in paragraphs 1 through 10
19 inclusive and paragraphs 17 through 20 inclusive hereinabove.

20
21 30. By virtue of Universal's said unlawful acts de-
22 scribed hereinabove, Universal will hold all proceeds which it will
23 receive, directly or indirectly, from the production, sale, and
24 distribution of the Universal photoplay as a constructive trustee
25 for the use and benefit of DDLC. DDLC requests the Court to de-
26 clare Universal such a constructive trustee and to order Universal
27 to convey any such proceeds to DDLC.

28 ///

29 ///

30 ///

31 ///

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A002083

1 WHEREFORE, counterclaimant DDLC prays for judgment
2 against counterdefendant Universal as follows:
3

4 1. That Universal and its agents, servants, employees,
5 and all persons acting in concert with them, and each of them, be
6 enjoined and restrained, preliminarily and permanently, from in
7 any way infringing the copyright in the original motion picture
8 photoplay "King Kong" and
9

10 (a) From casting, filming, editing, recording,
11 financing, producing, or distributing for exhibition any motion
12 picture photoplay based upon the Universal screenplay;
13

14 (b) From building sets, developing special effects,
15 developing working models of the character "Kong" or "King Kong,"
16 and from using, filming, or employing in any way such sets, special
17 effects, or working models already built or developed;
18

19 (c) From casting, filming, editing, recording,
20 financing, producing, or distributing for exhibition any motion
21 picture photoplay utilizing or containing the character, title, or
22 story of "Kong" or "King Kong";
23

24 (d) From using the character, title, or name "Kong"
25 or "King Kong" in any motion picture or motion picture photoplay or
26 screenplay, or from advertising, publicizing, announcing, represent-
27 ing, or publicly stating in any fashion that it is making, or is
28 entitled to make, cast, film, edit, record, finance, produce, or
29 distribute for exhibition any motion picture photoplay utilizing
30

///

///

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A002084

1 or containing the character, title, or story of "Kong" or "King
2 Kong."

3
4 2. That this Court forthwith issue an order directing
5 counterdefendant Universal
6

7 (a) To show cause why a preliminary injunction
8 should not be issued and granted so enjoining and restraining
9 counterdefendant Universal and its agents, servants, employees,
10 and all persons acting in concert with them, and each of them,
11 as set forth in the preceding paragraph 1, pending the hearing
12 and determination of this action, or further order of the Court,
13 and
14

15 (b) Further directing counterdefendant Universal
16 to deliver on oath during pendency of this action all materials
17 which infringe upon the copyright in the original motion picture
18 photoplay "King Kong";
19

20 3. That this Court issue an order directing destruction
21 of all materials delivered on oath by counterdefendant Universal
22 as infringing upon the copyright in the original motion picture
23 photoplay "King Kong";
24

25 4. For damages on the first, second, and third counts
26 herein in the amount of \$40,000,000 or according to proof;
27

28 5. For damages on the first, second, and third counts
29 herein in the amount of \$50,000,000, by way of punishing counter-
30 defendant Universal;
31

32 ///

///

A002085

-12-

123

1 6. That the Court declare that counterdefendant Univer-
2 sal holds or will hold all proceeds which it directly or indirectly
3 receives from the production, sale, or distribution of the Univer-
4 sal photoplay or any motion picture photoplay utilizing or contain-
5 ing the character, title, or story of "Kong" or "King Kong," as
6 constructive trustee for the use and benefit of counterclaimant
7 DDLC, and that said counterdefendant be ordered to convey said
8 proceeds to said counterclaimant;

9
10 7. For counterclaimant DDLC's costs of suit incurred
11 herein, together with its reasonable attorneys' fees as provided
12 by law; and

13
14 8. Such other and further relief as to the Court may
15 seem proper.

16
17 MITCHELL, SILBERBERG & KNUFF
18 ARTHUR GROMAN
19 D. W. HUNT

20 By

21  
22 D. W. Hunt
23 Attorneys for Dino De Laurentiis
24 Corporation
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RECEIVED

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FILED

DEC 19 1975

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 UNIVERSAL CITY STUDIOS, INC.)

12 Plaintiff,)

13 vs.)

14 RKO GENERAL, INC., et al.,)

15 Defendants.)

NO. CV 75-3526-R

AMENDED COUNTERCLAIM:

OF DEFENDANT

DINO DE LAURENTIIS

CORPORATION

17 RKO GENERAL, INC.,)

18 Counterclaimant,)

19 vs.)

20 UNIVERSAL CITY STUDIOS,)

21 Counterdefendant.)

23 DINO DE LAURENTIIS CORPORATION,)
24 INC., a corporation,)

Counterclaimant,)

25 vs.)

26 UNIVERSAL CITY STUDIOS, INC.,)
27 a corporation,)

28 Counterdefendant.)

30 ///

31 ///

32 ///

A002087

1 Defendant Dino De Laurentiis Corporation, for itself and
2 no other party herein, counterclaims against plaintiff Universal
3 City Studios, Inc., as follows:

4
5 FIRST COUNT

6 (Infringement of Statutory Copyright)

7
8 1. This action arises under the Copyright Law of the
9 United States, Title 17 United States Code §§ 1 et seq. as a claim
10 for infringement and substantial and related claims for unfair
11 competition. Jurisdiction is conferred on this Court by Title 28
12 United States Code § 1338.

13
14 2. Defendant and counterclaimant Dino De Laurentiis
15 Corporation ("DDLDC") is a corporation duly organized and existing
16 under the laws of Delaware and is qualified to do and is doing
17 business in the County of Los Angeles, State of California. At
18 all times mentioned herein, DDLDC was and now is an independent
19 motion picture producer of major stature engaged in the financing,
20 production, and distribution of theatrical motion pictures. DDLDC
21 has a reputation in said industry for producing motion pictures
22 of both great quality and high profitability.

23
24 3. DDLDC is informed and believes and based thereon
25 alleges that plaintiff and counterdefendant Universal City Studios,
26 Inc. ("Universal") is a Delaware corporation qualified to do and
27 doing business in the State of California.

28
29 4. DDLDC is informed and believes and based thereon
30 alleges that RKO General, Inc. ("RKO"), a defendant and counter-
31 claimant in this action, is a Delaware corporation qualified to do
32 ///

1 and doing business in the State of California.
2

3 5. Prior to 1933, RKO created and produced an original
4 motion picture photoplay entitled "King Kong" ("the original
5 photoplay"). DDLC is informed and believes and on that basis
6 alleges that said original photoplay is wholly original with RKO
7 and is copyrightable subject matter under the laws of the United
8 States. Prior to May 9, 1975, RKO complied in all respects with
9 the Copyright Law of the United States and all other laws governing
10 copyrights and secured the exclusive rights and privileges in and
11 to the copyright of said original photoplay and applied for and
12 received from the Register of Copyrights a certificate of registra-
13 tion of a claim to copyright identified as No. L 3794 and, on
14 December 5, 1960, obtained a renewal copyright therein, identified
15 as No. R 267264.
16

17 6. At all times mentioned herein said original photo-
18 play, "King Kong," has been published either by RKO or under its
19 authority and license in conformity with the provisions of the
20 Copyright Law of the United States and all other laws governing
21 copyrights. At all times mentioned herein, and subject to the
22 exclusive license hereinafter set forth, RKO was and still is the
23 sole proprietor of all rights, title and interest in and to the
24 copyright of said original photoplay.
25

26 7. On or about May 9, 1975 DDLC reached an agreement
27 with RKO by which RKO sold and DDLC purchased the exclusive right
28 and license to copy, produce, sell, and distribute a remake of the
29 original photoplay, and to use the name, title, and character
30 "Kong" or "King Kong" in connection with the production, advertis-
31 ing, and promotion of said remake. Pursuant to and as a part of
32 ///

1 said license, DDLC obtained and still has the exclusive right to
2 copy the story and expression of the original photoplay in connec-
3 tion with said remake.

4
5 8. Pursuant to its said exclusive license, at all times
6 after May 9, 1975 DDLC has expended and continues to expend con-
7 siderable time and money to remake the original photoplay, utili-
8 zing the name, characters, story, and expression of said original
9 photoplay. At great expense, DDLC has hired a screenwriter, direc-
10 tors, and actors, has released major advertising and publicity, has
11 developed a screenplay, has made film tests, has traveled exten-
12 sively in surveying locations, and has developed "special effects,"
13 all with respect to said production.

14
15 9. At all times mentioned herein Universal knew and was
16 on notice of all of the matters stated in paragraphs 5 through 8
17 inclusive hereinabove.

18
19 10. DDLC is informed and believes and based thereon
20 alleges that after May 9, 1975 Universal caused to be written a
21 screenplay (the "Universal screenplay"), unlawfully copying and
22 infringing upon the copyrighted original photoplay, including its
23 story and expression. Universal has publicly announced its inten-
24 tion to produce, sell, and distribute a remake of the original
25 photoplay based upon said unlawful screenplay, or a draft or
26 variation thereof. A true and correct copy of the Universal
27 screenplay is attached hereto as Exhibit "A" and by this reference
28 is incorporated herein. The original photoplay is a motion picture
29 which counterclaimant Dino De Laurentiis will make available and
30 exhibit to the Court.

31
32 11. Universal's said unlawful acts as alleged herein

1 above are causing and, unless enjoined and restrained by this
2 Court, will continue to cause DDLC great and irreparable injury
3 which cannot be adequately compensated or measured in money. DDLC
4 has no adequate remedy at law. Pursuant to 17 U.S.C. § 101(a) and
5 § 112, DDLC is entitled to preliminary and permanent injunctions
6 restraining and enjoining Universal's infringement of copyright.
7

8 12. As a direct and proximate result of Universal's
9 said unlawful acts as alleged hereinabove, DDLC has suffered
10 damages in an amount which it cannot now ascertain. DDLC is
11 informed and believes, and based thereon alleges, that it has
12 suffered such damages in an amount of not less than \$40,000,000.
13 Pursuant to 17 U.S.C. § 101(b) DDLC is entitled to recover from
14 Universal such damages as DDLC has suffered by reason of Univer-
15 sal's infringement of copyright, as well as all profits which
16 Universal may have or shall derive as a result of said infringe-
17 ment. DDLC will seek leave to amend this complaint to allege the
18 specific amount of such damages when such amount has been ascer-
19 tained.
20

21 13. By virtue of Universal's said unlawful acts,
22 Universal has been guilty of oppression, fraud, and malice and
23 DDLC, in addition to its actual damages, is entitled by reason
24 thereof to recover \$50,000,000 in damages for the sake of example
25 and by way of punishing Universal.
26

27 14. Pursuant to 17 U.S.C. § 101(c) and § 101(d), DDLC
28 is entitled to an order of this Court requiring Universal to
29 deliver up on oath to be impounded during the pendency of this
30 action, and to be destroyed upon such terms and conditions as
31 this Court may prescribe, all materials which infringe upon the
32

///

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1 copyright in the original photoplay "King Kong."

2
3 15. Pursuant to 17 U.S.C. § 116, DDLC is entitled to
4 recover, in addition to all of its monetary recovery, its reason-
5 able attorneys' fees incurred in commencing and prosecuting this
6 counterclaim. DDLC has employed attorneys to represent it in this
7 action and has incurred and will incur in the future, expenses for
8 attorneys' fees and other costs in connection with this action.
9 DDLC will ask leave of this Court to amend this complaint to
10 allege the exact amount of said attorneys' fees, costs, and
11 expenses when said amount has been fully ascertained.
12

13 SECOND COUNT

14 (Unfair Competition)
15

16 16. DDLC refers to and herein incorporates by reference
17 each and every allegation contained in paragraphs 1 through 10
18 inclusive hereinabove.
19

20 17. At all times mentioned herein the reputation of
21 the original photoplay and the name and visual depiction of the
22 character "Kong" or "King Kong" was and still is widely known by
23 the public both in the United States and abroad. At all times
24 since its original release, the original photoplay has been
25 available for commercial public viewing, either in motion
26 picture theatres or on television, and has received and continues
27 to receive considerable critical acclaim and financial success.
28 DDLC is informed and believes and based thereon alleges, that at
29 all times since the original release of the original photoplay,
30 RKO has regularly licensed the use of the title "King Kong" and
31 ///
32 ///

A002092

1 the name and visual depiction of "Kong" or "King Kong," for
2 commercial value, including licenses to plaintiff for two separate
3 motion pictures using the name, title, and character "King Kong"
4 or "Kong." As a result of said critical acclaim and widespread
5 recognition, the reputation of the original photoplay, including
6 the public recognition and good will attaching to it, the title
7 "King Kong," and the name and visual depiction of the character
8 "Kong" or "King Kong" have acquired a secondary meaning of sub-
9 stantial commercial value.

10

11 18. The Universal screenplay unlawfully appropriates
12 said title, reputation, name, and visual depiction. In addition,
13 Universal, in order to profit from said unlawful appropriation,
14 has publicly advertised and will in the future cause to be issued
15 advertisements concerning its intention to produce, under its own
16 name, a remake of the original photoplay. Each said advertisement
17 and press release either visually depicts the character "King
18 Kong" or "Kong" or refers to that title, name, or character.
19 Universal has thereby appropriated, continues to appropriate, and
20 will in the future appropriate the name, title, visual depiction,
21 reputation, public recognition, and good will accorded the original
22 photoplay and the fruit of RKO's work, expenditures, skills,
23 experience, and knowledge, all of which are the exclusive property
24 of DDLC by virtue of the license described in paragraph 7 above.
25 Universal has paid nothing and its said unlawful appropriation
26 is without any license, consent, or authority from DDLC or RKO or
27 any other person who may lawfully give such license, consent, or
28 authority.

29

30 19. The Universal screenplay and Universal's said

31 ///

32 ///

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1 advertisements and press releases are calculated, designed,
2 intended to, and do cause confusion as to the identity and content
3 of both the original photoplay and the remake now in production
4 by DDLC and as to the ownership of the name, visual depiction of
5 the character "Kong" or "King Kong," and the reputation, public
6 recognition, and good will accorded the original photoplay. Said
7 advertisements and press releases unlawfully and wrongfully use
8 and trade upon said name, and visual depiction, reputation, public
9 recognition, and good will, and constitute a wrongful, unlawful,
10 unjust, and unconscionable appropriation and taking by Universal
11 for its own use of said property.
12

13 20. The screenplay and photoplay which is now in
14 production by DDLC is of the highest quality and utilizes special
15 effects which have been developed and perfected at great expense
16 to DDLC.
17

18 21. By virtue of Universal's said unlawful acts,
19 Universal has or will unjustly enrich itself at the expense of
20 DDLC. Said acts defraud and cheat DDLC, constitute an appropri-
21 tion and invasion of DDLC's property rights, jeopardize the repu-
22 tation of DDLC as a producer of quality motion pictures, and
23 constitute unfair competition with DDLC.
24

25 22. Universal's said unlawful acts as alleged herein-
26 above are causing and, unless enjoined and restrained by this
27 Court, will continue to cause DDLC great and irreparable injury
28 which cannot be adequately compensated or measured in money. DDLC
29 has no adequate remedy at law.

30 ///

31 ///

32 ///

1 23. As a direct and proximate result of Universal's
2 unlawful acts as alleged hereinabove, DDLC has suffered damages
3 in an amount which it cannot now ascertain. DDLC is informed and
4 believes, and based thereon alleges, that it has suffered such
5 damages in an amount of not less than \$40,000,000. DDLC will seek
6 leave to amend this complaint to allege the specific amount of
7 such damages when such amount has been ascertained.
8

9 24. By virtue of Universal's said unlawful acts,
10 Universal has been guilty of oppression, fraud, and malice and
11 DDLC, in addition to its actual damages, is entitled by reason
12 thereof to recover \$50,000,000 in damages for the sake of example
13 and by way of punishing Universal.
14

15 THIRD COUNT

16 (Interference with Prospective Advantage)
17

18 25. DDLC refers to and herein incorporates by reference
19 each and every allegation contained in paragraphs 1 through 10
20 inclusive and 17 through 20 inclusive hereinabove.
21

22 26. By reason of the license described in paragraph 7
23 above, DDLC is in a position to realize substantial future economic
24 benefits from distribution or sale of its remake of the original
25 photoplay. By virtue of Universal's unlawful acts as described
26 hereinabove, Universal is unlawfully interfering with the prospec-
27 tive business interests and advantages of DDLC.
28

29 27. As a direct and proximate result of Universal's
30 said unlawful acts, DDLC will suffer damages in an amount which
31

32 ///

///

1 it cannot now ascertain. DDLC is informed and believes and based
2 thereon alleges that it will suffer such damages in an amount of
3 not less than \$40,000,000. DDLC will seek leave to amend this
4 complaint to allege the specific amount of such damages when such
5 amount has been ascertained.

6
7 28. By virtue of Universal's said unlawful acts,
8 Universal has been guilty of oppression, fraud, and malice and
9 DDLC, in addition to its actual damages, is entitled by reason
10 thereof to recover \$50,000,000 in damages for the sake of example
11 and by way of punishing Universal.

12
13 FOURTH COUNT

14 (Constructive Trustee)

15
16 29. DDLC refers to and herein incorporates by reference
17 each and every allegation contained in paragraphs 1 through 10
18 inclusive and paragraphs 17 through 20 inclusive hereinabove.

19
20 30. By virtue of Universal's said unlawful acts
21 described hereinabove, Universal will hold all proceeds which it
22 will receive, directly or indirectly, from the production, sale,
23 and distribution of the Universal photoplay as a constructive
24 trustee for the use and benefit of DDLC. DDLC requests the Court
25 to declare Universal such a constructive trustee and to order
26 Universal to convey any such proceeds to DDLC.

27
28 WHEREFORE, counterclaimant DDLC prays for judgment
29 against counterdefendant Universal as follows:

30
31 1. That Universal and its agents, servants, employees,
32 ///

1 and all persons acting in concert with them, and each of them, be
2 enjoined and restrained, preliminarily and permanently, from in
3 any way infringing the copyright in the original motion picture
4 photoplay "King Kong" and
5

6 (a) From casting, filming, editing, recording,
7 financing, producing, or distributing for exhibition any motion
8 picture photoplay based upon the Universal screenplay, or any
9 draft or variation of said screenplay;
10

11 (b) From building sets, developing special effects,
12 developing working models or costumes of the character "Kong" or
13 "King Kong," and from using, filming, or employing in any way such
14 sets, special effects, or working models or costumes already built
15 or developed;
16

17 (c) From casting, filming, editing, recording,
18 financing, producing, or distributing for exhibition any motion
19 picture photoplay utilizing or containing the character, title, or
20 story of "Kong" or "King Kong";
21

22 (d) From using the character, title, or name "Kong"
23 or "King Kong" in any motion picture or motion picture photoplay
24 or screenplay, or from advertising, publicizing, announcing, repre-
25 senting, or publicly stating in any fashion that it is making, or
26 is entitled to make, cast, film, edit, record, finance, produce,
27 or distribute for exhibition any motion picture photoplay utilizing
28 or containing the character, title, or story of "Kong" or "King
29 Kong."
30

31 2. That this Court forthwith issue an order directing
32 counterdefendant Universal

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1 (a) To show cause why a preliminary injunction
2 should not be issued and granted so enjoining and restraining
3 counterdefendant Universal and its agents, servants, employees,
4 and all persons acting in concert with them, and each of them,
5 as set forth in the preceding paragraph 1, pending the hearing
6 and determination of this action, or further order of the Court,
7 and
8

9 (b) Further directing counterdefendant Universal
10 to deliver on oath during pendency of this action all materials
11 which infringe upon the copyright in the original motion picture
12 photoplay "King Kong";
13

14 3. That this Court issue an order directing destruction
15 of all materials delivered on oath by counterdefendant Universal
16 as infringing upon the copyright in the original motion picture
17 photoplay "King Kong";
18

19 4. For damages on the first, second, and third counts
20 herein in the amount of \$40,000,000 or according to proof;
21

22 5. For damages on the first, second, and third counts
23 herein in the amount of \$50,000,000, by way of punishing counter-
24 defendant Universal;
25

26 6. That the Court declare that counterdefendant
27 Universal holds or will hold all proceeds which it directly or
28 indirectly receives from the production, sale, or distribution of
29 the Universal photoplay or any motion picture photoplay utilizing
30 or containing the character, title, or story of "Kong" or "King"
31 ///
32 ///

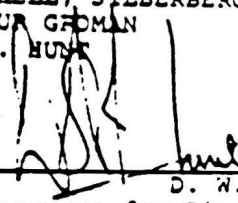
1 Kong," as constructive trustee for the use and benefit of counter-
2 claimant DDLC, and that said counterdefendant be ordered to convey
3 said proceeds to said counterclaimant;

4
5 7. For counterclaimant DDLC's costs of suit incurred
6 herein, together with its reasonable attorneys' fees as provided
7 by law; and

8
9 8. Such other and further relief as to the Court may
10 seem proper.

11
12 MITCHELL, SILBERBERG & KNUPP
13 ARTHUR GOODMAN
14 D. W. HUNT

15 By

16  D. W. Hunt
17 Attorneys for Dino De Laurentiis
18 Corporation
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14 Attorneys for Plaintiff and
15 Counterdefendant

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA
11

12 UNIVERSAL CITY STUDIOS, INC.,)
13 a corporation,)

14 Plaintiff,)

15 vs.)

16 RKO GENERAL, INC., et al.,)

17 Defendants.)

18 RKO GENERAL, INC.,)

19 Counterclaimant,)

20 vs.)

21 UNIVERSAL CITY STUDIOS, INC.,)

22 Counterdefendant.)

23 DINO DE LAURENTIIS CORPORATION,)
24 INC., a corporation,)

25 Counterclaimant,)

26 vs.)

27 UNIVERSAL CITY STUDIOS, INC.,)
28 a corporation,)

29 Counterdefendant.)
30

No. CV 75-3526 R

REPLY OF PLAINTIFF
AND COUNTERDEFENDANT
UNIVERSAL CITY STUDIOS,
INC. TO AMENDED
COUNTERCLAIM OF
DEFENDANT DINO DE
LAURENTIIS CORPORATION

31 Plaintiff and counterdefendant UNIVERSAL CITY
32 STUDIOS, INC. ("counterdefendant") in reply to the Amended

A002100

1 Counterclaim of defendant DINO DE LAURENTIIS CORPORATION
2 ("DDLDC") admits, denies and alleges as follows:
3

4 REPLY TO FIRST COUNT

5 1. Answering paragraph 1, counterdefendant admits
6 the allegations thereof, except that it denies the claims of
7 copyright infringement and unfair competition thereof.
8

9 2. Answering paragraph 2, counterdefendant admits
10 that DDLDC is a corporation organized and existing under the
11 laws of the State of Delaware and qualified to do and is doing
12 business in Los Angeles County, California. Except as
13 specifically admitted herein, counterdefendant denies each
14 and every allegation thereof.

15 3. Answering paragraph 3, counterdefendant admits
16 the allegations thereof.

17 4. Answering paragraph 4, counterdefendant admits
18 the allegations thereof.

19 5. Answering paragraph 5, counterdefendant admits
20 that defendant and counterclaimant RKO GENERAL, INC. ("RKO")
21 received from the Register of Copyrights a certificate of
22 registration of a claim to copyright identified as No. L 3794
23 and obtained a renewal copyright therein, identified as No.
24 R 267264. Except as specifically admitted herein, counter-
25 defendant denies each and every allegation thereof.

26 6. Answering paragraph 6, counterdefendant denies
27 each and every allegation thereof.

28 7. Answering paragraph 7, counterdefendant is
29 informed and believes and on that ground alleges that RKO
30 has entered into an agreement with DDLDC, pursuant to which
31 RKO purportedly granted to DDLDC, and DDLDC is claiming, the
32 exclusive right to produce a motion picture photoplay using
the name, title and character "Kong" or "King Kong". Except

1 as specifically alleged herein, counterdefendant denies each
2 and every allegation thereof.

3 8. Answering paragraph 8, counterdefendant denies
4 specifically that DDLC has an exclusive license from RKO to
5 copy, produce, sell and distribute a remake of the RKO photo-
6 play, notwithstanding the fact that it claims such right. With
7 respect to the balance of paragraph 8, counterdefendant has no
8 information or belief sufficient to enable it to answer the
9 allegations thereof, and on that ground denies each and every
10 allegation thereof.

11 9. Answering paragraph 9, counterdefendant denies
12 each and every allegation thereof.

13 10. Answering paragraph 10, counterdefendant denies
14 each and every allegation thereof. Further, counterdefendant
15 alleges that beginning in August, 1975, it did cause to be
16 written Exhibit A attached to the Amended Counterclaim.
17 Exhibit A is not the screenplay upon which counterdefendant's
18 motion picture will be based. Exhibit A has been superseded
19 by three additional drafts of a screenplay and there are still
20 further drafts contemplated by counterdefendant. The final
21 screenplay when completed, and counterdefendant's motion
22 picture to be based thereon, will not be unlawful and will
23 not infringe any copyright of the defendants herein, or any
24 other person.

25 11. Answering paragraph 11, counterdefendant denies
26 each and every allegation thereof.

27 12. Answering paragraph 12, counterdefendant denies
28 each and every allegation thereof, and, specifically, denies
29 that DDLC has been damaged in an amount not less than
30 \$40,000,000, or in any sum whatsoever, or at all.

31 13. Answering paragraph 13, counterdefendant denies
32 each and every allegation thereof, and, specifically, denies

A002102

1 that DDLC is entitled to punitive damages in the amount of
2 \$50,000,000, or in any sum whatsoever, or at all.

3 14. Answering paragraph 14, counterdefendant denies
4 each and every allegation thereof.

5 15. Answering paragraph 15, counterdefendant denies
6 each and every allegation thereof.

7
8 REPLY TO SECOND COUNT

9 16. Answering paragraph 16, counterdefendant hereby
10 incorporates by reference all of the denials, allegations and
11 admissions as set forth in its answers to paragraphs 1 through
12 10 above, as though the same were fully set forth herein.

13 17. Answering paragraph 17, counterdefendant denies
14 each and every allegation thereof.

15 18. Answering paragraph 18, counterdefendant denies
16 each and every allegation thereof.

17 19. Answering paragraph 19, counterdefendant denies
18 each and every allegation thereof.

19 20. Answering paragraph 20, counterdefendant has
20 no information or belief sufficient to enable it to answer
21 the allegations thereof, and on that ground denies each and
22 every allegation thereof.

23 21. Answering paragraph 21, counterdefendant denies
24 each and every allegation thereof.

25 22. Answering paragraph 22, counterdefendant denies
26 each and every allegation thereof.

27 23. Answering paragraph 23, counterdefendant denies
28 each and every allegation thereof and, specifically, denies
29 that DDLC has been damaged in an amount not less than
30 \$40,000,000, or in any sum whatsoever, or at all.

31 24. Answering paragraph 24, counterdefendant denies
32 each and every allegation thereof and, specifically, denies

1 that DDLC is entitled to punitive damages of \$50,000,000, or
2 in any sum whatsoever, or at all.

3
4 REPLY TO THIRD COUNT

5 25. Answering paragraph 25, counterdefendant hereby
6 incorporates by reference all of the denials, allegations and
7 admissions as set forth in its answers to paragraphs 1 through
8 10, inclusive, and 17 through 20, inclusive, as though the
9 same were fully set forth herein.

10 26. Answering paragraph 26, counterdefendant denies
11 each and every allegation thereof.

12 27. Answering paragraph 27, counterdefendant denies
13 each and every allegation thereof, and, specifically, denies
14 that DDLC has been damaged in an amount not less than
15 \$40,000,000, or in any sum whatsoever, or at all.

16 28. Answering paragraph 28, counterdefendant denies
17 each and every allegation thereof, and, specifically, denies
18 that DDLC is entitled to punitive damages in the amount of
19 \$50,000,000, or in any sum whatsoever, or at all.

20
21 REPLY TO FOURTH COUNT

22 29. Answering paragraph 29, counterdefendant hereby
23 incorporates by reference all of the denials, allegations
24 and admissions as set forth in its answers to paragraphs 1
25 through 10, inclusive, and paragraphs 17 through 20, in-
26 clusive, as though the same were fully set forth herein.

27 30. Answering paragraph 30, counterdefendant denies
28 each and every allegation thereof.

29
30 FIRST AFFIRMATIVE DEFENSE

31 31. The First Count of the Amended Counterclaim
32 fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

32. The First Count of the Amended Counterclaim fails to state a claim upon which relief can be granted in that counterclaimant has no standing to sue.

THIRD AFFIRMATIVE DEFENSE

33. The Second Count of the Amended Counterclaim fails to state a claim upon which relief can be granted.

FOURTH AFFIRMATIVE DEFENSE

34. The Second Count of the Amended Counterclaim fails to state a claim upon which relief can be granted in that counterclaimant has no standing to sue.

FIFTH AFFIRMATIVE DEFENSE

35. The Third Count of the Amended Counterclaim fails to state a claim upon which relief can be granted.

SIXTH AFFIRMATIVE DEFENSE

36. The Third Count of the amended Counterclaim fails to state a claim upon which relief can be granted in that counterclaimant has no standing to sue.

SEVENTH AFFIRMATIVE DEFENSE

37. The Fourth Count of the Amended Counterclaim fails to state a claim upon which relief can be granted.

EIGHTH AFFIRMATIVE DEFENSE

38. The Fourth Count of the Amended Counterclaim fails to state a claim upon which relief can be granted in that counterclaimant has no standing to sue.

/ / /

NINTH AFFIRMATIVE DEFENSE

39. Counterdefendant hereby incorporates by reference each and every affirmative allegation set forth in its Complaint on file herein, pursuant to Rule 10(c) of the Federal Rules of Civil Procedure.

WHEREFORE, counterdefendant UNIVERSAL CITY STUDIOS, INC. prays for judgment against counterclaimant DINO DE LAURENTIIS CORPORATION, as follows:

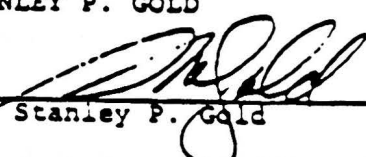
1. For an Order dismissing the counterclaim and ordering that counterclaimant take nothing thereby;

2. For costs of suit, including reasonable attorneys' fees; and

3. For such other and further relief as the Court deems just and proper.

DATED: January 12, 1976.

GANG, TYRE & BROWN
BRUCE M. RAMER
STANLEY P. GOLD

By 
Stanley P. Gold

ROSENFELD, MEYER & SUSMAN
ALLEN E. SUSMAN
STEPHEN A. KROFT

By 
Stephen A. Kroft

Attorneys for Plaintiff and
Counterdefendant

A No. I think the intention permeates Universal.

Q Let's turn now to the experience in the spring of 1975 when your company first became interested in doing a King Kong remake.

Would you tell us when that interest first came to your mind or came to your attention.

A Yes, as best I can.

I happened to be in the City of New York, I believe in March of 1975, when one evening as I was getting dressed I received a phone call from Hans Stromberg. Mr. Stromberg said that he was calling me in New York because he had something he thought was terribly exciting that he couldn't resist not calling me about.

And I said, "What is it?"

And he said, "I think we ought to make a King Kong film."

I was a bit taken aback by that. I thought about it for a moment and I think I may have turned to my wife, who was in the room, and said something like, "What do you think about making a King Kong film," or words to that effect.

And I responded to Mr. Stromberg that I thought it was quite an interesting idea that ought to be looked into and that I would be anxious to visit with him about it when I returned to the city.

A002107

Shainberg - Cross by Liebig

And I believe that was my first exposure to the idea of making a King Kong ~~film~~.

Q Mr. Stromberg, incidentally, was a producer on the payroll of Universal at the time?

A That is correct.

Q And in that conversation he said to you he had an idea for "a very big picture," didn't he?

A Yes, he did.

Q And at the time you were familiar with the RKO film King Kong?

A I was familiar with the fact that there had been a film called King Kong, at least one and maybe many.

Q And you felt it was --

THE COURT: He is not old enough, Mr. Liebig.

MR. LIEBIG: Pardon me?

THE COURT: He is not old enough.

BY MR. LIEBIG:

Q Well, you knew it as a remembered, known motion picture?

A As a remembered? What do you mean by that?

Q Well --

A I knew there was a film called King Kong. I had no knowledge at the time that it was an RKO film. And I, to the best of my knowledge, had never seen it.

A002108

Q Well, it was your understanding that it was considered a remembered, known film?

A Well, I guess I would have to say yes. It was considered a remembered, known film.

Q When you got back you discussed this policy with Mr. Wasserman, correct?

A I am sure I did on a number of occasions.

Q Would you tell us who Mr. Wasserman is?

A Mr. Wasserman is the chairman of the board and the chief executive officer of MCA, Inc.

Q And you also discussed it with a Mr. Ned Tannen?

A Yes, I did.

Q What was his post?

A Mr. Tannen is a vice president of MCA, Inc., and at that time was a senior executive in the motion picture division and subsequently thereto became executive vice president of Universal Pictures.

Q And it is true --

A And he happened to be the only person on the floor where Mr. Wasserman and I were physically situated.

Q Incidentally, the offices of MCA and Universal Studios are in the same place, are they not?

A In Los Angeles, yes.

Q That is, the executive offices.

A002109

1
2 A Yes, that is correct.

3 Q When you and Mr. Wasserman discussed this it was
4 your conclusion that you could have a very big film?

5 A Yes.

6 Q Something on the order of your company's Jaws?

7 A Hopefully.

8 Q Mr. Tannen, I think, believed it had a great com-
9 mercial potential?

10 A Yes.

11 Q Vast commercial potential?

12 A Yes.

13 Q Could you give the court some idea of what the
14 term "vast commercial potential" means in terms of the gross
15 of Jaws and Airport, some of those?

16 MR. GOLD: Your Honor, I am going to object as
17 irrelevant on what Jaws or Airport did in gross terms.

18 THE COURT: The objection is sustained.

19 MR. LIEBIG: Your Honor, it goes to motivation,
20 which I think we will tie up later.

21 THE COURT: Motivation for what? For making
22 the picture? You assume that to be.

23 MR. LIEBIG: Well, for the way they went about it,
24 I suppose. I think it will tie up. We will come back.

25 THE COURT:

A002110

BY MR. LIEBIG:

Q So after these discussions you had a man go to RKO and negotiate for rights to do a remake of the RKO King Kong picture?

A Well, in point of fact, when I first talked to Mr. Stromberg I believe Mr. Stromberg told me that they had already had a conversation with a senior business affairs executive of Universal City Studios and that this gentleman was already looking into it.

Q Well, there came a point in time, did there not, when you were aware that negotiations were going on between your company and RKO for the remake rights?

A Yes.

Q And there came a point in time when you believed that an agreement had been made?

A Yes.

Q And there came a point in time shortly thereafter, around early May 1975, where you were advised that RKO took the position that it had not made a deal with Universal?

A I can't remember whether it in fact was early May, but, putting aside the date, there came a point in time when it was brought to my attention that RKO took the position that it had no binding agreement.

Q I see. And at that point were you made

A00211.1

1 8:30 this evening.

2 THE COURT: All right.

3 MR. LIEBIG: He is getting my witness, your Honor,
4 Henry Martin.

5 MR. SIMON: The other part of our documents, Your
6 Honor, I apologize, but a number have been put in by counsel
7 already and I would like to save as much time as possible by
8 going through and striking some of them.

9 MR. LIEBIG: Your Honor, I apologize. The witness
10 went to move his car because he was worried about getting it
11 locked in the parking lot. Can we take a five-minute recess?

12 THE COURT: Yes. Five minutes.

13 (Short recess.)

14 MR. LIEBIG: Your Honor, RKO will call as its
15 next witness Henry Martin.

16 THE COURT: All right.

17 MR. LIEBIG: This, of course, has to do with the
18 counterclaim.

19
20 HENRY H. MARTIN,
21 called as a witness on behalf of Defendant RKO, having been
22 first duly sworn, was examined and testified as follows:

23 THE COURT: Please be seated and state your full
24 name, and spell your last name.

25 THE WITNESS: Henry H. Martin, M-a-r-t-i-n.

A002112

DIRECT EXAMINATION

BY MR. LIEBIG:

Q Where do you work, Mr. Martin?

A Universal Pictures.

Q And you are a corporate vice president of MCA, is that correct?

A Yes, sir.

Q You also have the title of president of a couple of the MCA subsidiaries, is that correct?

A Yes, sir.

Q Would you tell us which MCA subsidiaries you are president of?

A I am president of Universal Pictures, which is a division of Universal Studios, Inc.

I am also president of Universal Film Exchanges, Inc., which is a wholly-owned subsidiary of Universal Pictures.

Q You have been involved in the motion picture business as I understand, for about 41 years, is that correct?

A That is right.

Q And essentially with the Universal organization even back before it was involved with MCA?

A That is right.

Q Your experience during those years has been in the sale and distribution of motion pictures?

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A That is right.

Q And it is true, is it not, that from time to time you were consulted by the top management of the group of companies. Is it fair to call them the Universal group or the MCA group? How should I --

A That is acceptable to me since it was Universal to a period in time and then it became Universal and MCA. That grouping is satisfactory to me.

Q You are from time to time called upon to consult with top management of the companies regarding the sales potential of motion pictures?

A Yes.

Q On occasion you even are called upon to give your affidavit with regard to whether or not picture titles could be confused with one another?

A Yes.

Q Now, there is before you a copy of an affidavit which purports to bear your signature in the case of Universal City Studios, Inc., v. Brian Stone Distributors, Inc., pending in the Supreme Court of the State of New York. That is a true and correct copy of an affidavit you gave in that suit where Universal as owner of a motion picture entitled "American Graffiti" sued Brian Stone Distributors, Inc., as owners or distributors of that motion picture entitled "Teenage Graffiti".

1 Martin - Direct
2 alleging injurious similarity.

3 MR. GOLD: I would object, your Honor, as being
4 irrelevant to the issues in this case.

5 THE COURT: What is the relevancy, Mr. Liebig?

6 MR. LIEBIG: I think we will tie it up, your
7 Honor.

8 THE COURT: Tie it to what?

9 MR. LIEBIG: We are getting into the area of
10 secondary meaning, confusion of film titles, knowledge of the
11 plaintiff and counterdefendant Universal.

12 THE COURT: Do you think that is anything that is
13 going to be any problem, if there is a problem at all, about
14 King Kong and the Legend of King Kong in terms of being con-
15 fusing? Any problem with that? Do you need expert testi-
16 mony for that?

17 MR. LIEBIG: I don't really think I do, your
18 Honor, but I want to have a complete record. Here is a man
19 who not only is consulted by the company as to this sort of
20 matter but will testify as to the possibility of confusion in
21 this instance.

22 THE COURT: possibility of confusion is not the
23 subject of expert testimony in any event. Confusion to the
24 ordinary man, isn't it, to the average reasonable consumer of
25 the product, whatever it might be?

A002115

Martin - Direct

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2 MR. LIEBIG: Well, this man is a distributor and a
3 seller of motion pictures is, I think, expert or knowledgeable
4 in what the consumer -- that is, the moviegoing public under-
5 stands about titles.

6 THE COURT: No, he isn't.

7 MR. LIEBIG: Pardon me?

8 THE COURT: No, he isn't. If it is confusing
9 in a particular circumstance that has to be measured by the
10 reasonable, ordinary consumer.

11 MR. LIEBIG: Well, I think --

12 THE COURT: The cases so hold that you can't do
13 that by expert testimony. That is one of the few things the
14 Circuit has affirmed me on.

15 MR. LIEBIG: I think there are also cases that say
16 it can be so obvious that you didn't need proof.

17 THE COURT: Well --

18 MR. LIEBIG: -- as the court was inferring earlier.

19 THE COURT: All right.

20 MR. LIEBIG: Let me ask a question for the record.
21 We will pass the affidavit for the moment.

22 Q Mr. Martin, in your opinion as a man who is respon-
23 sible for selling and distributing motion picture products
24 does the moviegoing public in its mind make an identification
25 between titles and pictures and the makers of the pictures?

*Martin was only
an expert in selling pic-
tures not in knowing what
public thinks or believes*

Martin - Direct

MR. GOLD: I am going to object, your Honor, as irrelevant.

THE COURT: The objection is sustained.

BY MR. LIEBIG:

Q If a motion picture does well, would the identification, if any, be --

MR. GOLD: Objection, your Honor.

THE COURT: The objection is sustained.

BY MR. LIEBIG:

Q Mr. Martin, is it not the practice of motion picture companies, particularly your own company, operating on a belief that there is such an identity in a title and a picture to attempt to capitalize on a favorable identification by using or reusing all or part of a successful title?

MR. GOLD: Objection; irrelevant to the --

THE COURT: The objection is sustained.

BY MR. LIEBIG:

Q Is it not a fact that after the success of the motion picture Airport your company produced and distributed a motion picture entitled Airport 75?

MR. GOLD: Objection.

THE COURT: The objection is sustained.

BY MR. LIEBIG:

Q Is it true that after that success you produced a

A002117

Martin - Direct

1 motion picture entitled Airport, 76?

2 MR. GOLD: Objection; irrelevant.

3 THE COURT: The objection is sustained.

4 BY MR. LIEBIG:

5 Q Is it your understanding that your company is
6 currently contemplating a motion picture entitled Airport 77?

7 MR. GOLD: Objection; irrelevant.

8 THE COURT: The objection is sustained.

9 BY MR. LIEBIG:

10 Q The motion picture Sting was a Universal production,
11 was it not?

12 MR. GOLD: Objection.

13 THE COURT: Sustained.

14 MR. LIEBIG: Your Honor, maybe I can just shorten
15 this part of my questioning. I guess we could assume or
16 stipulate that the same objection and ruling would be made
17 with respect to Sting, Sting 2, Jaws, and Jaws 2.

18 THE COURT: All right?

19 MR. GOLD: So stipulated, your Honor.

20 BY MR. LIEBIG:

21 Q You are aware of the RKO motion picture King Kong,
22 are you not, sir?

23 A The original picture?

24 Q Yes.

25 A Yes.

A002118

1 Q In fact you have seen it once or twice?
2 A Yes, sir.

3 Q And you are aware it is a well-known motion picture.

4 THE COURT: Well known to whom, Mr. Liebig? My
5 children don't know anything about King Kong.

6 MR. LIEBIG: Well known to the public.

7 MR. GOLD: There is no foundation this witness
8 knows what the public knows.

9 THE COURT: The objection is sustained.

10 BY MR. LIEBIG:

11 Q In your opinion isn't the title King Kong identified
12 in the minds of the moviegoing public with the motion picture
13 King Kong?

14 MR. GOLD: Objection. It is irrelevant what
15 this witness' opinion is.

16 THE COURT: The objection is sustained.

17 BY MR. LIEBIG:

18 Q In your opinion --

19 THE COURT: There isn't much moviegoing public
20 that is left that was going to the pictures in the King Kong
21 days, not very much left as a moviegoing public.

22 MR. LIEBIG: Well, your Honor, there will be in
23 evidence that this movie has been shown many, many times since
24 its release in 1933, both on television and in motion pictures.
25

A002119

Handwritten notes and signatures at the bottom of the page, including "no such answer" and "Devered".

1 in re-releases.

2 THE COURT: All right.

3 BY MR. LIEBIG:

4 Q Do you know, sir, that the movie has been in re-
5 release and shown on television? Are you aware of that?

6 MR. GOLD: I guess that is --

7 THE COURT: There is a well-recognized method of
8 doing that nowadays that has been accepted as evidence and that
9 is poll-taking.

10 MR. LIEBIG: I know that, your Honor.

11 THE COURT: An expert cannot tell you that. The
12 expert poll taker can tell you whether or not his poll is taken
13 properly and therefore the significance of a poll, but the
14 expert can't tell you what a poll that has not been taken is
15 going to result in.

16 MR. LIEBIG: This is a man, your Honor, whom
17 Universal relies upon to gauge the public acceptance of motion
18 pictures, in fact, gambles large sums on his 41 years of ex-
19 perience in that field.

20 THE COURT: I recognize that. I am telling you
21 what the law is today.

22 MR. LIEBIG: Could I get my whole question in
23 for the record?

24 THE COURT: All right.

Martin - Direct

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BY MR. LIEBIG:

Q It is true, is it not, Mr. Martin, that in your opinion if somebody produced a motion picture with "King Kong" in the title the public would attend that movie believing that it was in some way connected with the original King Kong movie or the King Kong character?

MR. GOLD:

Objection.

THE COURT:

The objection is sustained.

MR. LIEBIG:

You may cross-examine.

MR. GOLD:

No questions, your Honor.

MR. SIMON:

No questions.

THE COURT:

Step down, Mr. Martin.

THE WITNESS:

I apologize for being late.

THE COURT:

No, I understand, Mr. Martin. The

parking around here is not that good.

9:00 o'clock tomorrow morning, gentlemen.

(Whereupon, at 6:30 o'clock p.m., Wednesday,

September 1, 1976, an adjournment was taken until

9:00 o'clock a.m., Thursday, September 2, 1976.)

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A002121

Goldman - Direct

MR. LIEBIG: Thank you, your Honor.

RKO will now call Mr. Bo Goldman, G-o-l-d-m-a-n.

ROBERT GOLDMAN,

called as a witness on behalf of Defendant RKO, having been first duly sworn, was examined and testified as follows:

THE CLERK: Please take the stand.

Please state your true name and spell your last name.

THE WITNESS: Robert Goldman, G-o-l-d-m-a-n.

THE CLERK: Please be seated.

DIRECT EXAMINATION

BY MR. LIEBIG:

Q What is your profession, Mr. Goldman?

A I am a writer.

Q Are you now specializing in motion picture writing?

A Yes, I am.

Q Would you tell the court some of the recent motion pictures you have written or been involved in the writing of?

A Well, I was coauthor of the screenplay of One Flew Over The Cuckoo's Nest.

I am involved now in the Melvin DeMarr Story.

I wrote the screenplay, in collaboration with two other people, of Pearl.

I wrote the screenplay of Switching.

A002122

1
2 I worked on the screenplay of The Judge And The
3 Hangman.

4 And I have done some work on the screenplay of
5 MacArthur.

6 Q In addition to motion pictures you have been in-
7 volved in television and plays and other forms of writing, have
8 you not, sir?

9 A Yes.

10 Q How long have you been a professional, full-time
11 writer?

12 A On and off for 20 years.

13 Q In August of 1975 were you employed by Universal,
14 sir?

15 A Yes.

16 Q Actually that was through your corporation, but
17 essentially they were hiring your services as a writer, is
18 that correct?

19 A Yes.

20 Q And you were hired by them, by Universal, that is,
21 to write a screenplay for a remake of the RKO motion picture
22 King Kong, were you not?

23 A Yes.

24 Q And who at Univesal were you principally involved
25 with in August of '75 at the time of your employment?

A002123

A Who did I speak to first?

Q Yes, sir.

A Ned Tannen.

Q And that did he tell you that Universal wanted you to do?

A He said they wanted to do King Kong and they wanted me to write it.

Q And did he tell you that they wanted to have the screenplay soon?

A No.

Q He didn't say anything about time?

A No.

Q At the time you were aware of the RKO motion picture were you not, sir?

A Yes, sir.

Q You had seen it before?

A Yes, I had.

Q You were aware that it was considered a classic?

A Yes, I was.

Q The first time you saw it was in 1972, wasn't it?

A Yes.

Q Where was that?

A In New York City.

Q Do you remember when your deposition was taken last

A002124

1 December?

2 A Yes.

3 MR. LIEBIG: I wonder if we could put a copy in
4 front of him.

5 MR. GOLD: Yes. Which volume?

6 MR. LIEBIG: Volume No. 1.

7 (Brief pause.)

8 BY MR. LIEBIG:

9 Q Would you read on page 24, sir, commencing at line
10 9 and going through line 22.

11 A "Besides what you have already told me, that Mr.
12 Tannen said" --

13 Q No, just read it to yourself, sir.

14 A I'm sorry.

15 (After reading) Yes, I have read it.

16 Q Were those the questions and answers asked of you
17 at that time?

18 A I believe so, yes.

19 MR. LIEBIG: Your Honor, I would like to read
20 lines 19 through 22 referring to a discussion with Mr. Tannen.

21 MR. GOLD: Your Honor, I object. If he is going
22 to read it, let him what he asked the witness to read, which
23 is the full context.

24 MR. LIEBIG: I am trying to save time. I would
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Question starting at line 9:

"Besides what you have already told me, that Mr. Tannen said that he had asked you if you would like to write King Kong, did he say anything else?

"A Well, he said he would like me to write King Kong for Universal and that they were enthusiastic about my work. And he asked me, you know, what my response was. And I said I would like to do it.

"2 Did he tell you how quickly he needed the screenplay?

'A NO.

"2 Did he give you any advice about the urgency of the project?

"A As I recall, it was soon. He would like it soon."

Q Continuing where we were, sir, you first saw King Kong in a theater in New York in 1972?

A Yes.

Q And knowing the film was a classic, considered a classic, and having seen it, you had what you have described as a sort of reverence for the film.

MR. GOLD: I am going to object, your Honor. He

Goldman - Direct

1 is leading the witness.
2 his questions properly.

This is direct and he should ask

3
4 THE COURT: The objection is sustained.

5 MR. LIEBIG: Well, your Honor, I think this is a
6 man who is employed by the other side. He is obviously, I
7 think, a hostile witness.

8 THE COURT: He is not a hostile witness. He
9 hasn't shown any hostility.

10 MR. LIEBIG: He is not a hostile man?

11 THE COURT: Well, that is what hostility is, that
12 is what permits leading questions of a hostile witness.

13 MR. LIEBIG: Well, I should use "adverse." I
14 will do it that way.

15 THE COURT: He is neither adverse, he is not an
16 adverse party nor the agent of an adverse party.

17 BY MR. LIEBIG:

18 Q Mr. Goldman, did you have a reference for the RKO
19 King Kong film?

20 MR. GOLD: I am going to object, your Honor, as
21 leading.

22 THE COURT: The objection is overruled on that
23 ground.

24 THE WITNESS: I would use the word "respect."
25

A002127

BY MR. LIEBIG:

Q Pardon me?

A I would use the word "respect."

Q Was your intention to write a script for a faithful remake of the film?

MR. GOLD: I am going to object, your Honor, as leading.

THE COURT: The objection is overruled.

THE WITNESS: Could you repeat the question, please?

THE COURT: Read the question to the witness.

(Record read.)

THE WITNESS: May I say I don't understand what that means, "faithful remake."

I wanted to make my own film, but I wanted to do justice to the original.

BY MR. LIEBIG:

Q Well, could you open the deposition to Volume 2, page 255, and read lines 1 through 4. Was that the question and answer on that occasion, sir?

A (After reading) Yes, I believe so.

MR. LIEBIG: Your Honor, I would like to read those lines.

Q And you wanted your remake to be faithful

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1 to the spirit or whatever of the original film,
2 would that have been the case?
3

4 "A Yes, that would have been the case."

5 Q Now, let's turn to the writing process.

6 Incidentally, about when did you start working on
7 the project?

8 A In August 1975.

9 Q And would you describe how you went about writing
10 your remake, what you did first?

11 A Well, I began some research. I tried to find
12 out everything I could about the original King Kong. There
13 had been volumes published about it, and I went to a cinema
14 bookshop and bought those volumes. I went to various film
15 libraries, books about films, like the AFI, UCLA, the Academy
16 Library, to read what had been written about it. I tried to
17 learn everything I could about King Kong through libraries,
18 through newspaper articles.

19 Then in a second period of research I tried to find
20 out everything I could about the substance of the story which
21 involved apes, Sumatra, Indonesia, tramp steamers, chemical
22 warfare, paleontology, New York in the '30s, the seamy side of
23 show business, characters who surfaced in the '30s who were
24 like third-rate versions of what Cousteau might be considered
25 today, things like that. Everything that might be useful to

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me.

Q Did Universal help you in this research?

A In some part.

Q Well, did they screen the film for you over at Universal?

A They screened the film for me, yes.

Q Did you they supply you with some written materials?

A I asked for a copy of the original screenplay and they supplied me with it, yes.

Q You mean the RKO film screenplay?

A Yes.

Q Can you remember anything else they supplied you?

A Yes. They supplied me with Scientific Americans, some articles about Indonesia, some books about Indonesia and Sumatra. And a volume about a tramp steamer, I believe. There was a packet of materials which came which I had requested, which were generally useful.

Q Did they supply you with a transcript prepared by someone over at Universal by watching and listening to the film?

A They gave me an abbreviated transcript that was about 25 pages long, which was of no use.

Q I see. What did they tell you that transcript was?

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Sargent Deposition

meeting and a lot of them were resolved because Ned made it clear that it was going to be an enormous project, a big budget, it was one of the biggest pictures of the year for Universal and that it was going to break some new ground and be a big challenge. I went home and thought about it.

"Q You went home and thought about it?

"A Yes.

"Q What did Mr. Etkes say during that meeting?

"A I don't remember specifically.

"Q Approximately how long did the meeting last?

"A Half hour.

"Q Did Mr. Mount say anything during that meeting?

"A He made some comments about the classic nature of the film.

"Q Can you remember his words?

"A No.

"Q When he was referring to the classic nature of the film, he was referring to

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FLORENCE GARCIA OFFICIAL REPORT

Sargent Deposition

the original RKO KING KONG?

"A Yes.

"Q What did you understand him to mean by
'classic'?

"A The way we usually apply the term, to
pictures that are well established in
audiences' minds as being of high cali-
ber and having made an enormous impres-
sion.

"Q Did you agree with that characterization?

"A Yes.

"Q Did you express your agreement at that
time?

"A Yes."

Page 25, lines 14 through 23:

"Q How many times have you seen KING KONG
to your knowledge? I am speaking now of
the original RKO movie.

"A Three times.

"Q Can you tell me what each of those three
times was?

"A The first was many years ago. I don't
remember quite when. That was my initial
exposure to it. The other two times were

Sargent Deposition
at Universal Studios -- no, I am sorry,
one was at Universal and one was on tele-
vision."

Page 106, line 12; through page 116, line 12:

"Q I think you pretty fairly recounted your
discussions with Mr. Goldman and with
the various Universal personnel regarding
the script.

"Can you tell us what else you have been
doing since August as director of this
project?

"A I am not sure I understand the question.
Could I have it back?

"Q It was a roundabout question.

"Your testimony is that you were hired
on as director of the KING KONG project
commencing in mid-August.

"A Yes.

"Q And Mr. Hunt in his questioning has gone
into some detail concerning what you have
done as far as talking with Mr. Goldman and
talking with other people about the script
since that time.

"A Yes.

A002133

1 reference.

2 Your Honor, these next exhibits go to the claim
3 of RKO that there has been some dilution of its exclusive
4 use of the name King Kong. They are evidence of a number of
5 uses of King Kong by third parties, none of which indicate
6 any reference to RKO. I would like to offer them one at a
7 time. They have been supplied to counsel.

8 THE COURT: All right.

9 MR. KROFT: I will identify them as I give them
10 to the clerk.

11 The first is Exhibit 119. It is a certificate of
12 registration of the claim to copyright, Registration No.
13 A1277602A -- it is not very well described but it seems to
14 be a comic book entitled King Kong. The author is listed
15 as Meriam C. Cooper, published by Western Publishing
16 Company. It indicates a date of the first publication
17 June 6, 1968. I suppose I should offer it with 120, which
18 is a certified copy of the comic book received from the
19 copyright office.

20 MR. LIEBIG: It is irrelevant. I don't see what
21 issue it bears on, your Honor. As the Court has pointed out,
22 we have enough exhibits here already.

23 MR. KROFT: Your Honor, this will go to all these
24 exhibits that I intend to offer. Maybe I can characterize
25

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1 them generally so you know where I am going.

2 There are a few others of what you might call
3 prose works entitled King Kong, registered in the copyright
4 office with dates of publication listed. There are also a
5 number of songs published and registered for copyright in
6 the copyright office together with the number of phonograph
7 records using the name King Kong. When I get done with
8 those, your Honor, I intend to introduce evidence of several
9 cartoons using the name King Kong, all of which show a
10 wide use of the name King Kong, so much so that we believe,
11 your Honor, that the name King Kong is no longer subject
12 to dilution even if it once had any distinctive quality with
13 respect to the dilution statute in the State of California.

14 As such, it is not capable of any further
15 dilution as a basis of damages. That is not to say, of course,
16 that there couldn't be passing off of the name King Kong
17 by the party, but that does not seem to be RKO's theory here.

18 MR. LIEBIG: Your Honor, these documents, if
19 they show anything, they show use, which I suppose builds up
20 the secondary meaning. But in any event they don't show
21 unconsented use. The first one, for instance, is use in
22 a comic book licensed by Meriam Cooper. Under that grant
23 of rights he has in the --

24 THE COURT: Mr. Liebig, the question is dilution.
25 If there happens to be an awful lot of consensive use, you

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1 can hardly dilute it by unconsented use if it is minimal,
2 can you?

3 MR. LIEBIG: Your Honor, dilution means somebody
4 wrongfully using it. If you use it yourself, then that is
5 not deemed dilution. In the law of trademark and unfair
6 competition, it is called use. Now, if you overuse anything
7 maybe it becomes so common it's not valuable, but that is
8 not dilution.

9 THE COURT: Well, what is it then? To what
10 subject matter does it go? In other words, that this is
11 not possible to be the subject of a dilution because it has
12 already been diluted by the owner himself to such an extent
13 that it does not mean anything?

14 MR. LIEBIG: Let's use the analogy of a gold
15 mine. If the owner of the gold mine and I shovel the gold
16 out and it becomes less and less of a mine with less and
17 less gold, I have nobody to blame. If somebody else comes
18 and does the shoveling, the fact is it is diluted.

19 THE COURT: No. If all they got is dirt, there
20 is no damage. They have to dig out gold. If you have taken
21 out all of the gold, there isn't anything left, Mr. Liebig,
22 using your example.

23 MR. LIEBIG: Well, let me try it from another
24 direction. This is a King Kong called Giant Classic Comic
25 Book, which I am sure will not fascinate the Court, 1968.

1 I suppose it is proof of secondary meaning. I don't know
2 why we want to clutter up the record. If we can let it all
3 in --

4 THE COURT: Let me understand something,
5 Mr. Liebig, because I'm lost here. Secondary meaning of what?
6 That is secondary meaning of RKO? You know, RKO and King
7 Kong are synonomous; is that what you are talking about?
8 That is what secondary meaning says, that when you see the
9 word immediately it gives you the idea of something else.
10 That is what secondary meaning is in the law.

11 MR. LIEBIG: I am familiar with the law, your
12 Honor.

13 THE COURT: All right.

14 MR. LIEBIG: Now, if the Court reads MGM, the
15 Metro-Goldwyn-Mayer vs. Lee, and some of the other cases we
16 have cited here, they show that you don't in this day and
17 age have to necessarily identify the name or trademark with
18 the actual manufacturing company. Now, you have these old
19 cases where the shredded wheat biscuit had to be identified
20 with National Biscuit Company, that type of thing. Today
21 the title could take on more of a life of its own. The
22 consumer learns about King Kong. He knows about King Kong.
23 He knows about the production. He doesn't really have to
24 know that it is RKO Radio Pictures that made it in 1934 for
25 there to be secondary meaning. Now, that is the state of

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1 secondary meaning law today. Certainly in California,
2 under the cited cases, Jackson vs. Universal, MGM vs. Lee,
3 Johnson vs. 20th Century Fox, the title itself partakes the
4 secondary meaning; the reverence of the secondary meaning is
5 work, the product of the play, the show, whatever, not the
6 company that produced it.

7 THE COURT: I would be more interested because we
8 can save a lot of time as to what evidence thus far has done
9 to that.

10 MR. LIEBIG: The long, continuous and wide claim
11 of copyrighted motion picture photoplay called King Kong.
12 The playing of that in theaters for the last 40 some years.
13 The testimony indicates it is still in the theaters. The
14 testimony indicates it is still on TV. There have been
15 sequels. There have been funny books.

16 Let's use an example of Mickey Mouse. I think
17 there is a huge and obvious value in Mickey Mouse. Mickey
18 Mouse Productions, and that value is irrespective of whether
19 the kid out in Nebraska knows Mickey Mouse is the property
20 of Walt Disney Productions, and we have a Mickey Mouse case
21 cited, it is the Air Pirate case, Walt Disney Productions vs.
22 Air Pirates in the Northern District of California, which
23 goes into that in great detail.

24 Now, that is what we understand to be the law,
25 and we have cited a great many cases which I think demonstrate

1 that beyond any possible doubt.

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2 THE COURT: I recognize the case. I asked you for
3 the evidence.

4 MR. LIEBIG: The evidence, the long continued
5 widespread public use and acceptance and acclamation of
6 this motion picture and its various progeny; that is what
7 builds in the public's mind. Whether you want to call it
8 identification or recognition, it is something they know
9 and knowing it, they buy embodiments of it. They go into
10 these theaters, they turn on television stations, they buy
11 books. It has a value, the title, the character.

12 THE COURT: I do not understand what evidence is
13 there of that here. As far as the record is concerned,
14 Mr. Liebig, I do not have that anybody even bought one
15 comic book or went into one theater or bought one novel or
16 bought one tee shirt.

17 MR. LIEBIG: We have in evidence that Mr. Sheinberg,
18 the president of Universal, felt it was a valuable name and
19 property and it would bring people --

20 THE COURT: I recognize that, Mr. Liebig. That
21 is one man, and I am sure -- maybe the public regard doesn't
22 indicate it, but I am sure Mr. Sheinberg has made mistakes
23 in his lifetime. All of us --

24 MR. LIEBIG: Your Honor, when an identical title
25 is used -- we talked about surveys the other day, and we had

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1 a discussion on them and their value. I went back to my
2 office and looked for some authority for the proposition
3 if the only way you can show identification in the public
4 mind is by survey, and frankly I didn't find it. I may have
5 overlooked it, but I have seen a lot of cases where it's
6 been proved other ways.

7 THE COURT: How, counsel?

8 MR. LIEBIG: I think the Court --

9 THE COURT: How other ways except by bringing
10 people in here, which happened in a case. They brought in
11 a lot of people to say, yes, I get confused by this or I
12 apply this name with such-and-such company. We had our own
13 poll in court.

14 How else have they proved it? Do you find any
15 cases where they have done it by other than expert testimony?

16 MR. LIEBIG: We don't have to prove confusion of
17 similar things here. Universal used the identical thing.

18 THE COURT: No, counsel. Have you found any
19 case where they have done it by expert testimony?

20 MR. LIEBIG: I have found cases where they have
21 done it with and without. MGM vs. Lee is one. There is
22 no expert testimony there. The Court said you are using
23 the same title. Jackson vs. Universal, they showed use.
24 They said the play ran in such-and-such and such-and-such
25 city. They had books; they had this or that; they didn't

1 go out to take a poll.

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2 THE COURT: What I am telling you is did you find
3 any case in which it was done with expert testimony? Did
4 you read Carter-Wallace vs. Proctor and Gamble?

5 MR. LIEBIG: I have not found expert testimony
6 on that.

7 THE COURT: Did you read Carter-Wallace vs.
8 Proctor and Gamble? As I told you, it is one of the few
9 cases that I have been affirmed on in the Court of Appeals
10 so I remember it vividly.

11 MR. LIEBIG: I have led --

12 THE COURT: We will take our afternoon recess
13 for ten minutes.

14 (Short recess.)

15 MR. LIEBIG: Your Honor, on this pile of exhibits
16 and a vertible haystack of things, I suppose maybe what
17 I could do would be to just make an omnibus objection under
18 403 that based on considerations of undue delay, waste of
19 time or needless presentation of cumulative evidence and
20 irrelevance and let them go in. I just don't see where it
21 goes.

22 THE COURT: What are we talking about? What
23 pile of what?

24 MR. LIEBIG: Why don't we just show him what that
25 is, Mr. Kroft?

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(Brief pause.)

THE COURT: All right. That objection is made,
is overruled.

330-A, 330-C, 330-D, 155, 154, 153, 152, 151, 150,
149, 148, 147, 146, 145, 144, 143, 142, 141, 140, 139, 138,
137, 136, 135, 134, 133, 132, 131, 130, 129, 128, 127, 126,
125, 124, 123, 122, 121, 120 and 119 and 330-B in evidence.

(Plaintiff's Exhibits 119, 120,
121, 122, 123, 124, 125, 126,
127, 128, 129, 130, 131, 132,
133, 134, 135, 136, 137, 138,
139, 140, 141, 142, 143, 144,
145, 146, 147, 148, 149, 150,
151, 152, 153, 154, 155, 330-A,
330-B, 330-C, and 330-D were
received in evidence.)

MR. KROFT: Thank you, your Honor.

The next documents I have, I advised Mr. Cooper's
attorneys that these documents are offered only on the counter-
claim and not against Mr. Cooper, the next documents are
offered only on the counterclaim. Exhibit 90, 91-A, 91-B,
91-C, 91-D.

MR. LIEBIG: I object to those on the grounds of
relevance. They self-evidently appear authorized uses by
Mr. De Laurentiis in connection with his movie so I don't
see what relevance there is.

MR. KROFT: Those are all of the ads placed by
Paramount and Dino De Laurentiis. I believe 190 is the
art work prepared by Dino De Laurentiis. I think the

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1 relevance is nowhere on those ads does the name King Kong
2 appear -- on one of them it says there is only one King Kong,
3 and RKO's name does not appear there.

4 MR. LIEBIG: The resumption of our discussion
5 earlier, but I know of no requirement that RKO's name be
6 on there. If that is a point of relevance, it is --

7 THE COURT: It does go, Mr. Liebig, as to what
8 the public is going to think King Kong is, what it is. I
9 think there is probably a substantial, if you are asking
10 me to take any kind of judicial notice because I haven't
11 gotten any filings from you, but if you are asking me to
12 take notice I would think there is a substantial segment
13 of the public below the age of 20 who think King Kong comes
14 from songs and not from the motion picture done by RKO or
15 anybody else, for that matter. I do not have any basis upon
16 which to say that or it is a motion picture or anything
17 else, but that is the question that has been addressed,
18 what the public associates King Kong with. 91-C, -B, 91-D,
19 91-A and 90 in evidence.

20 (Plaintiff's Exhibits 90, 91-A,
21 91-B, 91-C, and 91-D were
22 received in evidence.)

23 MR. KROFT: I have a few more exhibits I would
24 like to interrupt the introduction of at this point to
25 call my last witness, Hunt Stromberg.

A002143

1
2 is, do you claim, sir?

3 A Five percent.

4 Q And you have in fact filed a lawsuit in that
5 regard, have you not?

6 A Yes, sir.

7 Q Well, Mr. Sheinberg testified earlier in the
8 week that you were the person at Universal who came up with
9 the idea of doing a remake of King Kong.

10 A Correct.

11 Q Is that correct?

12 A Yes.

13 Q And that you called him in New York City and
14 told him about this idea.

15 A Correct.

16 Q At the time you came up with the idea and called
17 Mr. Sheinberg, had you seen the RKO King Kong picture?

18 MR. KROFT: Objection, irrelevant.

19 THE COURT: The objection is sustained.

20 What is the point of that, Mr. Liebig?

21 MR. LIEBIG: Your Honor, I wanted some more
22 testimony as to public knowledge and identification,
23 secondary meaning. It seemed to me fortuitously this man
24 arrived on the stand and --

25 THE COURT: He is not the consuming public. He is

Stromberg - Cross

not the person to whom secondary meaning is addressed in the context of this lawsuit. It may be a secondary meaning to a producer, but that is not what we are talking about here.

MR. LIEBIG: This is the problem we got to with Mr. Martin, sir. It is his business to indicate -- he is just like the fisherman, he has to catch fish. If we want to find out how to catch the fish, it is pretty hard to ask the fish, but we can ask the fisherman. That is the category I put both Mr. Stromberg and earlier Henry Martin.

THE COURT: That presumes that he is an expert in poll taking, and you haven't qualified him as that or that he has taken a poll on which he can make the conclusion that King Kong has secondary meaning to the consuming public.

MR. LIEBIG: Well, your Honor, I don't want to beat this to death.

THE COURT: You qualify a fisherman as a man who has fished.

MR. LIEBIG: Pardon me?

THE COURT: You qualify a fisherman as a man who has fished. You have never qualified Mr. Stromberg as one who has taken a poll to make a determination to whether or not there is any secondary meaning to King Kong in the consuming public's mind.

MR. LIEBIG: Well, there are lots of different

A002145,

ways --

THE COURT: If you do it today, Mr. Liebig, you might be in big trouble because I would expect, I don't know, but I would expect there are an awful lot of youngsters out there who think King Kong is a song done by one of those artists. If you asked them what is King Kong, they will tell you that.

MR. LIEBIG: I can't qualify as a poll taker, but --

THE COURT: And I cannot either, but I'm just telling you that I suspect that.

MR. LIEBIG: Well, there are various ways to fish, just as there are to find out what is in the public's mind.

THE COURT: Only one way to catch them.

MR. LIEBIG: Well, we got nets. We have line.

THE COURT: You have to know if the fish is going to bite what you put down there or the fish has been biting what you put down there is more important.

MR. LIEBIG: Well, the people who have managed to endure in the motion picture business have somehow discovered what the public will come to see, your Honor. They tell me that this is --

THE COURT: They may, Mr. Liebig, come to see

Stromberg - Cross

1 King Kong movies because it is a horror story or whatever
2 they advertise. They may know that they do that if you
3 have a giant gorilla, but they are not coming because RKO
4 made the picture of King Kong. That is what we are talking
5 about. It might be also because they hear that name King
6 Kong, and they have heard some song that might remind them
7 of something that may be pretty neat to them and for which
8 they might want to see a movie made for whatever reason.
9 But we don't know those reasons. I hardly think that your
10 clients as well as Universal would rest upon making a movie
11 and doing no advertising of their own on the theory that
12 they are going to fill the theaters with what is going to
13 be the overflow from King Kong in 1932 or '33. Just ain't
14 gonna do it.

15
16 MR. LIEBIG: No, sir. We were --

17 THE COURT: Okay?

18 MR. LIEBIG: We got to that in Mr. Martin's
19 deposition, although not in his testimony here. Well, I
20 won't beat it to death, your Honor, because I think you
21 have made very clear what your ruling is on the subject.

22 THE COURT: All right.

23 MR. LIEBIG: I have no further questions.

24 MR. KROFT: Nothing further.

25 THE COURT: Step down, Mr. Stromberg.

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THE WITNESS: Thank you.

THE COURT: Call your next witness.

MR. KROFT: I have no further witnesses, your Honor, just a few more documents.

THE COURT: All right.

(Brief pause.)

MR. KROFT: Your Honor, just a few more documents and then I think we will be in a position to rest our defense of the counterclaim. These again are offered only against RKO on the counterclaim.

THE COURT: All right.

MR. LIEBIG: No objection to those three. As a matter of fact, I will adopt them as my own on the issue of secondary meaning.

MR. KROFT: Your Honor, the first is 167, the next is 170 and the next is 171.

171, your Honor, is the song book full of a number of songs; one of them is King Kong. It appears about 60 percent down the left hand side of the title.

THE COURT: 167, 170, 171 in evidence.

(Plaintiff's Exhibits 167, 170 and 171 were received in evidence.)

MR. KROFT: Your Honor, the next two documents are news stories. The first one is 172. It appeared January 5, 1976, in an issue of Time Magazine. It is under

the "Show Business" section entitled "Monkey Business."

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The next is a newspaper article taken from the November 5, 1975 issue of the Los Angeles Times headed "Two New Films Planned" and underneath that "King Kong" by Charles Champlin. I would like to offer those next in order.

MR. LIEBIG: No objection. In fact, we will adopt those as evidence of notoriety and secondary meaning.

THE COURT: 172 and 173 in evidence.

(Plaintiff's Exhibits 172 and 173 were received in evidence.)

MR. KROFT: Next, your Honor, is a copy of a Peanuts cartoon strip in the Los Angeles Times this last Sunday, August 29, 177-A.

MR. LIEBIG: No objection. I likewise adopt that as evidence of notoriety to the comic strip reading public.

THE COURT: 177-A in evidence.

(Plaintiff's Exhibit 177-A was received in evidence.)

MR. KROFT: Your Honor, we previously marked as Exhibit 180 several documents from the files of Dorothy Jordan Cooper. I offer just two of them. I would identify them as 180-A and 180-B. 180-A is a copy of a comic strip from the Wizard of Id dated 9/20. We do not have the year.

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THE COURT: 180-A.

(Plaintiff's Exhibit 180-A was marked for identification.)

MR. KROFT: 180-B is a copy of, in fact, I withdraw 180-B, your Honor. Perhaps I could replace it with this document which does not come from the files of Dorothy Jordan Cooper. It is a cartoon which was cut out of the The New Yorker Magazine sometime since the state court action was filed. I cannot identify it any further than that, but Mr. Liebig has indicated he does not have a problem with the foundation for it.

THE COURT: 180-B and 180-A in evidence.

(Plaintiff's Exhibits 180-A and 180-B were received in evidence.)

MR. KROFT: Your Honor, that concludes Universal's defense of the counterclaim.

THE COURT: Any rebuttal?

MR. PETRICH: Your Honor, we have only to mark certain pages of Mr. Gittleston's deposition. There are just about five pages.

THE COURT: All right.

MR. PETRICH: Maybe if we -- if you would like us to take a brief recess and do that?

THE COURT: Is there anything else, any other live witnesses?

1 shown to be no actual damages —

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2 THE COURT: I think Mr. Liebig has at least agreed,
3 if anything, it's statutory.

4 MR. KROFT: All right. I'll pass on that. There's
5 no sense belaboring that.

6 THE COURT: He wants punitive damages and lots of
7 money for that.

8 MR. KROFT: Well, I understand he does, your Honor,
9 but I don't think that he made the showing necessary to get,
10 under Count One, of course, attorneys' fees. He has to show
11 that there was some bad faith on the part of Universal in
12 producing and having the screenplay written with the inten-
13 tion to produce it.

14 But, my gosh, if nothing else is shown here, we have
15 close questions of law and I certainly think that Universal is
16 shown to have been in good faith here.

17 With respect to Count Two, the unfair competition
18 claim, I don't want to belabor the discussion about the second-
19 ary meeting that the Court had with Mr. Liebig yesterday. I
20 would only want to point out a couple of things.

21 One, Jackson vs. Universal, a case which Mr. Liebig
22 relies on, your Honor, makes it very clear that a finding of
23 whether there's a secondary meaning or not is a question of
24 fact and that question of fact has to be determined on all of
25 the evidence.

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1 We don't think there has been any evidence intro-
2 duced at least by RKO to show that there is an exclusive
3 association by the public of the name RKO either with RKO or
4 with its motion picture.

5 The Carter-Wallace case which has been mentioned
6 several times here makes it very clear that strong evidence
7 for a finding that there is no secondary meaning is evidence
8 that other people, other users, have used the same mark that
9 the plaintiff lays claim to.

10 In this case we introduced a substantial amount of
11 evidence, your Honor, to show that there are third parties
12 apparently unconnected with RKO who have used the name King
13 Kong.

14 I'm not now talking about the two motion pictures,
15 King Kong versus Godzilla and King Kong Escapes, which appar-
16 ently were licensed by RKO, but rather the wealth of material
17 which we introduced from the copyright office.

18 You have the book by Fred Gavin entitled King Kong
19 and you have the monologue by Bob Newhart, Exhibit 124 and
20 the exhibit number on the book, by the way, Exhibit 122.

21 You have at least eleven songs entitled King Kong
22 and you have the name King Kong throughout.

23 You have several cartoons at least two of which are
24 in evidence, Exhibit 180 and 177-A.

25 All of this shows a lack of exclusivity of use by

1 RKO and at least having brought these matters forward, RKO
2 should have, if they thought or contended those documents or
3 songs -- or if they contended they were under permission from
4 RKO, your Honor, they should have come forth and proven it,
5 that it was by permission from RKO, your Honor, and the infer-
6 ence has to be to the contrary.

7 We don't think, your Honor, that there would be a
8 likelihood of confusion between Universal's advertisement --
9 and there was only one advertisement -- and RKO. There is
10 strong evidence I think in Exhibit 172 and 173, a newspaper
11 article from the Los Angeles Times and a news article from
12 Time Magazine both of which make it very clear that Universal
13 was not claiming any rights through RKO but rather was seeking
14 rights against RKO.

15 Mr. Liebig in his brief, counsel for RKO, seems to
16 indicate that, even in the absence of a showing of actual
17 damages -- I think on Count Two he acknowledges there was no
18 actual damages in terms of a loss of business or diversion of
19 revenues.

20 Nevertheless he seems to claim that he is neverthe-
21 less entitled to damages on a trademark dilution theory.

22 I would cite the Court to the case of Dawn vs.
23 Sterling Drug, Inc., a case which was cited, as I say, which
24 held that damages --

25 Your Honor, this is a Central District of California.

1 case. It specifically held that in California damages are not
2 available on a trademark dilution theory.

3 Very interestingly enough, by the way, the only pure
4 dilution case cited in RKO's brief, Polaroid Corporation vs.
5 Polaroid, Inc. at 319 Fed 2d 830. A dilution case.

6 The court granted an injunction for dilution but
7 specifically denied the request for damages and an accounting
8 for profits. We just don't think damages are available --

9 THE COURT: Well, let me ask you. Is this a trade-
10 mark or a trade name at all? Since in that movie, the trade-
11 mark or trade name as I saw it was the tower with the radio
12 beams, isn't it?

13 MR. KROFT: Well, that's a good question, your Honor.
14 We don't know --

15 THE COURT: Isn't that the trademark of RKO or it
16 was at that time?

17 MR. KROFT: It was certainly the identifying logo
18 of RKO.

19 We don't think King Kong can be a trademark because
20 of the dilution, because of its usage in the English language.
21 So much so that it's been diluted beyond RKO.

22 But we made that point and I don't want to belabor
23 it further.

24 That, your Honor, then brings me to the consent
25 issue. I don't think there can be any question that Mr. O'Shea

1 had the authority and was the agent of RKO to make the contract
2 with Universal which he did make on April 15. There is no
3 evidence to the contrary and RKO doesn't seem to contest the
4 fact in these proceedings.

5 I also don't think there can be any dispute whatever
6 that a contract was made -- and I don't want to burden the
7 Court by reviewing all of the evidence, but I would like to
8 briefly refer to three things that make it very clear that a
9 contract was made on April 15, 1975.

10 Mr. Shane's testimony was uncontroverted by any
11 witness. He stated he made a deal with Mr. O'Shea on April 15.

12 He stated on April 16 Mr. O'Shea, after receiving
13 Universal's net profits rider, called him and asked him, "How
14 do you compute net profits under our deal? I want to make
15 sure I understand what you previously told me."

16 Then you have Mr. Stromberg who was called apparent-
17 ly gratis by Mr. O'Shea on either the 15th or 16th stating the
18 same thing: "I made a deal."

19 Unless there be any doubt, you have Exhibit 97, Mr.
20 Youngman's draft, a draft of a contract between Universal and
21 RKO which contains all of the terms and conditions of the
22 contract which Mr. Shane said that he made with Mr. O'Shea.

23 That then gets us to a legal question, a legal
24 question which I think your Honor has correctly decided last
25 week and that is whether the Statute of Frauds can be an issue

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1 MR. LIEBIG: The whole point of Kong is that the
2 beast does capture the girl and she escapes and then in New
3 York he captures again.

4 I mean half the movie he's going around with her in
5 his hand. I can't think of any more important part of the
6 motion picture and this has no relation to it.

7 Well, again, it's in the record. I would say that
8 any similarity is totally ideational, unprotected character
9 and again it's a question of law.

10 So, you know, I'm either right or wrong.

11 On the matter of the so-called consent defense --
12 No. I have one more thing on the the unfair competition, the
13 claim against Universal.

14 The Court said, "Well, could King Kong even be a
15 trade name, could it be a trademark?"

16 And I would say as I tried to say yesterday that,
17 no, we don't think it's a trade name or a title. I mean, no,
18 we don't think it's a trademark. We think it is a title
19 which is protected by the principles of unfair competition.

20 That's all it has to be. Titles are treated some-
21 what differently than trade names. There is some similarity
22 in the treatment, but again all I can do is talk about Jackson
23 vs. Universal and MGM vs. Lee which sets that out.

24 So we do say it's a title and we say it's a valuable
25 title.

1 Now, Mr. Kroft in his argument said that there were
2 all these things showing uses of King Kong which were -- his
3 words were, "Well, they are apparently unauthorized"; and of
4 course nothing could be further from the truth and I think
5 Mr. Kroft is well aware --

6 THE COURT: Where is the evidence to the contrary?

7 MR. LIEBIG: Well, I'm going to come to that, your
8 Honor.

9 THE COURT: All right.

10 MR. LIEBIG: We've made our files on licensing open.
11 They have combed through them and that's where they found out
12 about most of these things.

13 The burden of showing unauthorized use is on Univer-
14 sal. The burden of proof on that point is on Universal.

15 We had in court and pretty well indexed the licens-
16 ing file, the RKO original licensing file.

17 If he wants to challenge any one of those and say he
18 has evidence that this was unauthorized, we can pull it right
19 out. That's what I had Mr. Robertson doing here.

20 THE COURT: Well, there's nothing on anything there
21 that indicates it's licensed.

22 MR. LIEBIG: Well, your Honor --

23 THE COURT: Wouldn't you have to have something on
24 the document or on the use --

25 MR. LIEBIG: No.

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1 THE COURT: -- to indicate its license?

2 MR. LIEBIG: No.

3 THE COURT: In the absence of a license in hand?

4 MR. LIEBIG: Absolutely not. No. No requirement.

5 THE COURT: Every use is presumptively licensed or
6 is it the other way around? Every use is presumptively unli-
7 censed until proven to be licensed?

8 MR. LIEBIG: As in every other area, the law places
9 the burden on the owner -- the law places upon him the burden
10 to protect his property.

11 If RKO finds a use that's unlicensed, it knows it.
12 It goes after the person. It doesn't look at the particular
13 thing to see if it says licensed or unlicensed or --

14 THE COURT: I don't have any evidence that says
15 they did or didn't in this case.

16 MR. LIEBIG: All right.

17 THE COURT: I'm saying, Mr. Liebig, isn't the pre-
18 sumption that a use is unlicensed until it is proven to be
19 licensed?

20 MR. LIEBIG: No, sir.

21 THE COURT: Well --

22 MR. LIEBIG: Well, number one --

23 THE COURT: No?

24 MR. LIEBIG: Well, you asked me and I'm trying to
25 answer you.

1 Number one, the law usually presumes that things
2 are done lawfully.

3 Number two, I gather these things were attempted to
4 be put forth by Universal as an affirmative defense.

5 Now, your Honor, when you put forth something as an
6 affirmative defense, you have the burden of proof. They put
7 forth the use.

8 I said at the time that, as far as I'm concerned --

9 THE COURT: Other than by the owner of the copyright.

10 MR. LIEBIG: But they didn't put in any evidence as
11 to whether those uses were permitted or not permitted and
12 they have the burden. They were well aware at the time I
13 said to your Honor, "I don't see what these relate to, but in
14 some regard I will adopt them as my own exhibits because they
15 evidence use and secondary meaning," which they do.

16 Now, if counsel had wanted to try to prove any of
17 those were unlicensed, he was free to do it. He has had
18 access to our licensing files all along.

19 THE COURT: Why didn't you put it in, Mr. Liebig?

20 MR. LIEBIG: It wasn't my obligation. Why should
21 I prove something --

22 THE COURT: Even though the state of the evidence
23 is now that there was a use of the name by a person other than
24 the owner -- the claimed owner of the copyright?

25 MR. LIEBIG: Well, your Honor, that happens all the

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1 time. There is in evidence the fact that RKO previously
2 licensed Mr. Beck who licensed Toho who made King Kong Meets
3 Godzilla who then had Universal distribute it.

4 You have King Kong Meets Godzilla out there. That's
5 authorized.

6 THE COURT: Well, I take it that was to show that
7 there had been no abandonment of the copyright by RKO and I
8 take it that that was to show that they were in a position
9 and they had the power to license.

10 MR. LIEBIG: No.

11 THE COURT: That's what that evidence is in for.

12 MR. LIEBIG: No. He put that in to show Dan O'Shea's
13 signature on this document in 1957 when, instead of being
14 seventy-seven he was fifty-eight.

15 He says that this shows that he has all this author-
16 ity.

17 THE COURT: That's the limited purpose for which it
18 was shown?

19 MR. LIEBIG: They went all around to get Mr. O'Shea's
20 name on a document. That was the reason they put it in. As
21 far as I'm concerned, it shows a continuing authorized use of
22 the title --

23 THE COURT: Let me put it to you differently. If
24 they had just put in, just put in the name of King Kong versus
25 Godzilla and said to the Court that was authorized by RKO

1 because it's presumptively done so, I don't think that you
2 would have allowed it, would you?

3 MR. LIEBIG: It would have depended on what they
4 put it in for?

5 THE COURT: All right.

6 MR. LIEBIG: If it was for showing use and would I
7 stipulate that it was authorized, yes, I would stipulate.

8 RKO got paid for it.

9 THE COURT: All right. Mr. Liebig, I think that
10 the law, the status of the law, is that, when a claimed use
11 of something that is copyrighted is done by other than the
12 owner of the copyright, presumptively it's unlicensed and if a
13 person who is using it wants to continue to use it he has to
14 prove that it's licensed.

15 MR. LIEBIG: Well, they weren't putting this in on
16 the copyright count.

17 THE COURT: Or use of the title of whatever --

18 MR. LIEBIG: Well, your Honor, it makes --

19 THE COURT: The person who is claiming the title.
20 The presumption that, if it's not attributed and it's used by
21 somebody other than the claimed owner, then the presumption is
22 that it's an improper use.

23 MR. LIEBIG: Well, your Honor, if that's the pre-
24 sumption, it's a new rule.

25 All I know is that the law presumes that the law is

1 obeyed and a defendant on the counterclaim -- I should say a
2 counter-defendant with an affirmative defense -- that he has
3 the burden of proof on that defense.

4 THE COURT: Mr. Liebig, in a copyright case, all
5 you've got to do is put in your copyright and show that the
6 other party used that name or that idea or that verbalization
7 and then rest. That's your case.

8 Infringed if that's all the case comes to.

9 The other side, who is now claiming use of it with-
10 out the person's name on it, has to come in and show that he
11 was licensed if that's the point. But the case of a copyright
12 infringement is: Copyright. Here's our work. Here's their
13 work. Rest.

14 You don't have to say, "We didn't license him."

15 MR. LIEBIG: Well, your Honor, the issue is clearly
16 drawn and I again --

17 THE COURT: Anything else on a prima facie case in
18 a copyright case? Copyright. Your work. Their work. Same.
19 That's all.

20 MR. LIEBIG: No.

21 THE COURT: You have to show it's unlicensed?

22 MR. LIEBIG: Well, lot's of times you find that
23 they both go back to a common source. I have a case like
24 that --

25 THE COURT: Mr. Liebig, come on. Come to this case

to my question.

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MR. LIEBIG: All right. In this case when they put in those King Kong things, they didn't put it in on the copyright issue. They put it in on the unfair competition on the counterclaim.

THE COURT: Well, assuming they did that, it would be the other party who would have to take it back to the common source if that's their claim for defense.

MR. LIEBIG: In any event --

THE COURT: In any event they need the copyright, the work, the claimed infringing work, and then rest. That's all.

MR. LIEBIG: Fine, but what does that have to do with the use we're talking about here?

THE COURT: Because I'm saying that it is the party who is claiming that it is licensed who has the burden of showing that it is licensed.

MR. LIEBIG: I'm not claiming it's licensed.

THE COURT: Well --

MR. LIEBIG: He's claiming it's unlicensed.

THE COURT: It is presumptively unlicensed.

MR. LIEBIG: No, it isn't. That's where we disagree.

Anyway, I think we have beaten it to death, your

Honor.

THE COURT: They are doing it in reverse for you.

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CENTRAL DISTRICT OF CALIFORNIA
BY *[Signature]* DEPUTY

ENTERED

DEC 21 1976

CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
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14 Attorneys for Plaintiff
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16 Universal City Studios, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

17 UNIVERSAL CITY STUDIOS, INC.,
18 a corporation,

Plaintiff,

vs.

19 RKO GENERAL, INC., a corporation,
20 DINO DE LAURENTIIS CORPORATION,
21 a corporation, and RICHARD COOPER,

Defendants.

No. CV 75-3525 R

22 RKO GENERAL, INC., a corporation,

Defendant and
Counterclaimant,

vs.

23 UNIVERSAL CITY STUDIOS, INC.,
24 a corporation,

Plaintiff and
Counterdefendant.

25 RICHARD COOPER,

Defendant and
Cross-Complainant,

vs.

26 RKO GENERAL, INC., a corporation,

Defendant and
Cross-Defendant.

JUDGMENT

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1 This cause came on regularly for trial commencing
2 on September 1, 1976, before the Court sitting without a
3 jury, Gang, Tyre & Brown by Bruce M. Ramer and Stanley P.
4 Gold, and Rosenfeld, Meyer and Susman by Allen E. Susman and
5 Stephan A. Kroft, as attorneys for plaintiff and cross-
6 defendant Universal City Studios, Inc.; Lillick, McHose &
7 Charles by Anthony Liebig, Kenneth E. Kulzick and Andrew W.
8 Robertson, and Youngman, Rungate & Leopold by Louis P.
9 Petrich, attorneys for defendant, counterclaimant and cross-
10 defendant RKO General, Inc.; and Radison, Pfaelzer, Woodard,
11 Quinn & Rossi by Richard K. Simon and Lee L. Blackman, at-
12 torneys for defendant and cross-complainant Richard Cooper;
13 no appearance at trial by counsel for defendant Dino
14 DeLaurentiis Corporation having been made. The Court, having
15 heard the testimony and having examined the proofs and
16 evidence offered by the respective parties, and the cause
17 having been submitted for decision, and the Court being
18 fully advised in the premises, and having made its findings
19 of fact and conclusions of law directing that judgment be
20 entered in favor of plaintiff and counterdefendant Universal
21 City Studios, Inc., and against all defendants, it is
22 hereby:

23 DECLARED, ORDERED, ADJUDGED AND DECREED that:

24 1. With reference to the novel entitled "King
25 Kong" which was initially published by Grosset & Dunlap, Inc.
26 and copyrighted by said company, the purported renewal of
27 copyright therein by Patricia Marion Caldecott Frere and
28 the Certificate of Registration of a Claim to Renewal Copy-
29 right, No. 251,390, issued to her, was and is of no force
30 or validity. Said novel is and has been in the public do-
31 main since December 27, 1960, the date of expiration of the
32 original term of copyright therein.

2 . With reference to the two-part serialization
of the work entitled "King Kong" initially published by
Tower Magazines, Inc. in the February 1933 and March 1933
issues of its publication "Mystery Magazine" and copyrighted
by said company, said two-part serialization is and has
been in the public domain since expiration of the respective
original terms of copyright in said issues of "Mystery
Magazine." The original term of copyright in the February
1933 issue of "Mystery Magazine" expired on December 20,
1960, and the original term of copyright in the March 1933
issue of "Mystery Magazine" expired on January 23, 1961.

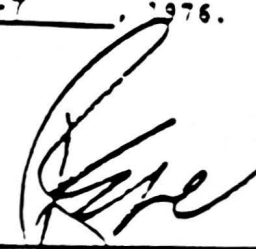
3. Plaintiff Universal City Studios, Inc. may
produce, sell, distribute, exhibit and otherwise exploit
a motion picture based on and using any and all elements
contained in the works declared to be in the public domain
in Paragraphs 1 and 2 of this Judgment, above, and to en-
title such motion picture "King Kong," so long as plaintiff
does not, during the remaining period of the term of re-
newal copyright in the motion picture entitled "King Kong"
owned by defendant RKO General, Inc., copy copyrightable
matter contained in said motion picture of RKO General,
Inc. which is not contained in said works declared to be
in the public domain in Paragraphs 1 and 2 of this Judgment,
above. Such a motion picture produced by plaintiff Universal
City Studios, Inc. will not infringe upon the renewal copy-
right in the motion picture owned by defendant RKO General,
Inc. or upon any of defendants' other rights.

4. Counterclaimant RKO General, Inc. shall
take nothing under either Count I or Count II of its
Counterclaim against counterdefendant Universal City
Studios, Inc.; and said counterclaim is hereby dismissed
on the merits.

1 5. Universal City Studios, Inc. shall have
2 and recover its costs of suit against defendants RKO General,
3 Inc. and Richard Cooper.

4 6. The Clerk shall enter this Judgment forth-
5 with, the Court expressly determining that there is no just
6 reason for delay.

7
8 Dated: November 24, 1976.

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United States District Judge

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Total costs in sum of \$ 2940.⁰⁰ against defts

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I hereby certify that the foregoing is a true and correct copy of the original as the same appears on the file of this Court.

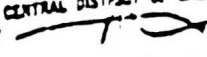
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CENTRAL DISTRICT OF CALIFORNIA



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CENTRAL DISTRICT OF CALIFORNIA

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CLEAR U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY  DEPUTY

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15 and Counterdefendant
16 Universal City Studios, Inc.

17 UNITED STATES DISTRICT COURT

18 CENTRAL DISTRICT OF CALIFORNIA

19 UNIVERSAL CITY STUDIOS, INC.,
20 a corporation,

21 Plaintiff,

22 vs.

23 RKO GENERAL, INC., a corporation,
24 DINO DE LAURENTIIS CORPORATION,
25 a corporation, and RICHARD COOPER,

26 Defendants.

No. CV 75-3526 R

27 RKO GENERAL, INC., a corporation,

28 Defendant and
29 Counterclaimant,

30 vs.

31 UNIVERSAL CITY STUDIOS, INC.,
32 a corporation,

33 Plaintiff and
34 Counterdefendant.

35 RICHARD COOPER,

36 Defendant and
37 Cross-Complainant,

38 vs.

39 RKO GENERAL, INC., a corporation,

40 Defendant and
41 Cross-Defendant.

FINDINGS OF FACT

AND CONCLUSIONS OF LAW

A002168

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1 This cause came on regularly for trial commencing
2 on September 1, 1976, before the Court sitting without a jury,
3 Gang, Tyre & Brown by Bruce M. Ramer and Stanley P. Gold, and
4 Rosenfeld, Mayer & Susman by Allen E. Susman and Stephen A.
5 Kroft, as attorneys for plaintiff and cross-defendant Universal
6 City Studios, Inc. ("Universal"); Lillick, McRose & Charles by
7 Anthony Liebig, Kenneth E. Kulzick and Andrew W. Robertson, and
8 Youngman, Hungate & Leopold by Louis P. Petrich, attorneys for
9 defendant, counterclaimant and cross-defendant RKO General,
10 Inc. ("RKO"); and Radison, Pfaelzer, Woodard, Quinn & Rossi by
11 Richard K. Simon and Lee L. Blackman, attorneys for defendant
12 and cross-complainant Richard Cooper ("defendant Cooper");
13 no appearance at trial by counsel for defendant Dino DeLaurentiis
14 Corporation having been made. The Court, having heard the
15 testimony and having examined the proofs and evidence offered
16 by the respective parties, the counterclaim by defendant Dino
17 DeLaurentiis Corporation having heretofore been dismissed pur-
18 suant to stipulation and order thereon, and the cause having
19 been submitted for decision, and the Court being fully advised
20 in the premises, makes its findings of fact, as follows:

21
22 UNIVERSAL'S COMPLAINT

23 FINDINGS OF FACT

24 1. The work entitled "King Kong" (sometimes re-
25 ferred to herein as the "Story") consists of the story of the
26 search for, and discovery of, a giant gorilla known as "Kong"
27 or "King Kong," and his ultimate capture and destruction. The
28 story includes all of the elements thereof, including, without
29 limitation, the characters, characterizations, character names,
30 the interplay and development of such characters, the plots,
31 action, dialogue, themes, settings and all other parts and
32 portions thereof (collectively, "elements"), as contained in

1 the Mystery Magazine Serializations (as defined below) and the
2 Novel (as defined below). The Story was published and copy-
3 righted in the following chronological order:

4 (a) The first segment of the Story was pub-
5 lished by Tower Magazines, Inc. in the February 1933 issue of
6 its publication entitled "Mystery Magazine" (~~the~~ ^{hereafter} "First
7 Serialization") and copyrighted in its name; the date of first
8 publication thereof was December 20, 1932.

9 (b) The entire Story was published in the form
10 of a novel entitled "King Kong" (~~the~~ ^{hereafter} "Novel"), by Grosset
11 & Dunlap, Inc. and copyrighted in its name; the date of first
12 publication thereof was December 27, 1932.

13 (c) The second segment of the Story was pub-
14 lished by Tower Magazines, Inc. in the March 1933 issue of
15 its publication entitled "Mystery Magazine" (~~the~~ ^{hereafter} "Second
16 Serialization") and copyrighted in its name; the date of first
17 publication thereof was January 23, 1933. (The First Serializa-
18 tion and the Second Serialization are jointly sometimes re-
19 ferred to herein as the "Mystery Magazine Serializations.")

20 (d) The Story was published in the form of a
21 motion picture entitled "King Kong" (~~the~~ ^{hereafter} "Motion Picture")
22 by RKO's predecessor and copyrighted in its name; the date of
23 first general release thereof was February 24, 1933. All right-
24 title and interest of such predecessor in the Motion Picture
25 have devolved upon RKO.

26 2. No renewal of the copyright in the Mystery
27 Magazine Serializations was attempted or secured by anyone.

28 3. Patricia Marion Caldecott Frere (~~the~~ ^{hereafter} "Frere"), a
29 daughter of Edgar Wallace (~~the~~ ^{hereafter} "Wallace"), filed an application for
30 a Claim to Renewal Copyright in the Novel on February 2, 1960,
31 claiming as the proprietor of a posthumous work. A Certificate
32 of Registration of a Claim to Renewal Copyright No. R 251,390

^{hereafter}
1 (~~the~~ "Frere renewal") was issued to her by the U.S. Copyright
2 Office. No one other than Frere applied for or received a
3 Certificate of Registration of a Claim to Renewal Copyright in
4 the Novel. In September 1964, Frere quitclaimed her interest
5 in the Frere renewal to Marian C. Cooper (^{Wallace} "A Cooper").

6 4. RKO renewed the copyright in the Motion Picture
7 on December 5, 1960, and was issued a Certificate of Registra-
8 tion of a Claim to Renewal Copyright No. R 267,274.

9 5. Prior to any contacts by Cooper with either RKO
10 or Wallace in 1931, Cooper had conceived and reduced to con-
11 crete expression the basic elements of the Story.

12 6. Wallace first started working with Cooper in
13 writing a screenplay to embody the Story not earlier than
14 December 23, 1931.

15 7. Cooper and Wallace executed a document dated
16 January 23, 1932, entitled an Assignment of All Rights, grant-
17 ing to RKO the right to produce and distribute a motion picture
18 embodying the Story, but reserving the right to publish the
19 Story in book and serial form. There is no evidence that, by
20 such reservation, Cooper and Wallace intended to or did alter
21 their respective rights and interests in the Story inter se;
22 by such assignment and reservation, Wallace did not receive any
23 ownership interest in the Story. Neither Wallace nor his Estate
24 at any time had an ownership interest, either legal or equit-
25 able, in the Story or the Novel or the Mystery Magazine Seriali-
26 zations.

27 8. Wallace died on February 10, 1932, a resident of
28 London, England, survived by his widow and children, among them
29 Frere. In 1932, after Wallace's death, all of his rights in
30 literary properties and copyrights passed to his Estate. There-
31 after, on May 25, 1934, all such rights passed to a British
32 corporation called Edgar Wallace, Ltd.

1 9. Wallace wrote a screenplay containing elements of
2 the Story previously conceived by Cooper prior to Wallace's
3 death.

4 10. The screenplay written by Wallace was abandoned and
5 was not utilized in the production of the Motion Picture or in
6 the writing of the Mystery Magazine Serializations or the Novel.

7 11. The Motion Picture as produced was based upon
8 a screenplay written by James Ashmore Creelman and Ruth Rose
9 after the death of Wallace, and does not use or embody, and
10 was not based upon, any contribution by Wallace.

11 12. Wallace did not create, contribute or write any-
12 thing contained in the Motion Picture, the Mystery Magazine
13 Serializations or the Novel. Specifically, but not in limita-
14 tion of the foregoing, it is not true that Wallace created,
15 contributed to or wrote: (i) any of the elements of the Story,
16 including any elements of the Motion Picture, Novel and Mystery
17 Magazine Serializations; (ii) any ideas or elements concerning
18 King Kong's undressing the heroine; or (iii) any ideas or
19 elements concerning the fight scene between King Kong and a
20 meat-eating dinosaur, or the treatment of the heroine during
21 such scene.

22 13. In or around September 1932, RKO arranged for
23 publication of the Mystery Magazine Serializations. Cooper
24 was aware of and authorized these arrangements prior to such
25 publication.

26 14. Subsequent to the publication of the First
27 Serialization, Cooper also consented to and ratified such pub-
28 lication.

29 15. The Estate of Wallace ("Wallace Estate"), through
30 its legal representative, T. M. Till, consented to and ratified
31 the publication of the Mystery Magazine Serializations by agree-
32 ing with Cooper to accept one-half of Cooper's receipts from

1 the exploitation of said Mystery Magazine Serializations and by
2 making no objection to such publication thereafter.

3 16. RKO and Cooper arranged for, and Cooper authorized,
4 publication of the Novel by Grosset & Dunlap, Inc., and Cooper
5 permitted Grosset & Dunlap, Inc. to copyright the Novel in its
6 name as the copyright proprietor.

7 17. The writing, and all arrangements for publication,
8 of the Mystery Magazine Serializations and of the Novel were
9 made after the death of Wallace.

10 18. The Wallace Estate, through its legal representa-
11 tive, T. M. Till, consented to and ratified the acts of Cooper
12 described in Finding of Fact No. 16, above, by agreeing with
13 Cooper to accept one-half of Cooper's receipts from the exploita-
14 tion of the Novel and by making no objection to its publication
15 thereafter.

16 19. At all times appropriate for the filing of ap-
17 plication for, or issuance of, Certificate of Registration of
18 a Claim to Renewal Copyright in the Novel, Frere was not the
19 distributee, assignee or successor in interest to any claim of
20 ownership of the Wallace Estate in the Novel or the copyright
21 therein.

22 20. At all times appropriate for the filing of ap-
23 plication for, or issuance of, Certificate of Registration of a
24 Claim to Renewal Copyright, Frere was not the distributee, as-
25 signee or successor in interest to any claim of ownership of
26 Edgar Wallace, Ltd. in the Novel or the copyright therein.
27 Frere, in filing the copyright renewal application in her name,
28 was not authorized to, and did not, act on behalf of Edgar
29 Wallace, Ltd.

30 21. At all times appropriate for the filing of
31 application for, or issuance of, Certificate of Registration
32 of a claim to Renewal Copyright in the Novel, Grosset & Dunlap,
33

1 Inc. was the proprietor of the copyright in the Novel. 1

2 22. Cooper died on April 21, 1973. Defendant Cooper 2
3 has succeeded to all claimed right, title and interest of Cooper
4 in the subject matter of this action. 4

5 23. Universal is engaged, among other things, in 5
6 the business of producing and distributing motion pictures. 6
7 It presently intends, and has the present ability, to make 7
8 a motion picture based on the story or elements thereof as con- 8
9 tained in the Mystery Magazine Serializations and the Novel, 9
10 when the decision in this action permitting it so to do becomes 10
11 final. 11

12 24. In furtherance of its aforementioned intention, 12
13 Universal has expended substantial time, effort and money on 13
14 production activities prior to commencement of principal photo- 14
15 graphy. As a result thereof, it has, among other things, 15
16 developed valuable techniques, mechanical devices and other equip- 16
17 ment which it intends to utilize in production of its motion 17
18 picture when permitted to do so by final judgment in this action. 18

19 25. A dispute exists between plaintiff and defendants, 19
20 as follows: 20

21 (a) RKO and defendant Dino DeLaurentiis Corpora- 21
22 tion assert that RKO has exclusive rights (except to the extent 22
23 of any rights which may have been reserved originally by Cooper 23
24 and Wallace, and except insofar as licensed by RKO) to the 24
25 story by virtue of its copyright and renewal copyright in the 25
26 Motion Picture. 26

27 (b) The defendant Cooper asserts that the Mystery 27
28 Magazine Serializations were unauthorized by Cooper and there- 28
29 fore did not divest the story of common law copyright protec- 29
30 tion; and that the copyright in the Novel has been validly re- 30
31 newed and is owned by him. 31

32 / / / 32

1 (c) Universal asserts that the Story is in the
2 public domain and that it has the right to make a motion picture
3 based on and using the Story or elements thereof, as contained
4 in the Mystery Magazine Serializations and the Novel so long as
5 Universal's motion picture does not copy other copyrightable
6 materials which are contained in the Motion Picture but which
7 are not contained in the Mystery Magazine Serializations or the
8 Novel.

9
10 CONCLUSIONS OF LAW

11 1. This action arises under the Copyright Act of
12 the United States, Title 17, United States Code. A case of
13 actual controversy exists between Universal, on the one hand,
14 and the defendants, on the other. The Court has jurisdiction
15 of this action pursuant to the provisions of Title 28, United
16 States Code, Sections 1338(a) and 2201.

17 2. The first segment of the Story, as embodied in
18 the First Serialization, is now, and since the expiration on
19 December 20, 1960 of the original term of copyright therein has
20 been, in the public domain.

21 3. The entire Story, as embodied in the Novel, is
22 now, and since the expiration on December 27, 1960 of the
23 original term of copyright therein has been, in the public
24 domain.

25 4. The second segment of the Story, as embodied in
26 the Second Serialization, is now, and since the expiration on
27 January 23, 1961 of the original term of copyright therein has
28 been, in the public domain.

29 5. Wallace was not an author or joint author of the
30 Story under the Copyright Act, and neither Wallace, the Wallace
31 Estate, Edgar Wallace, Ltd. nor Frere was a legal or equitable
32 owner or joint owner of the Story, the Novel or the Mystery

1 Magazine Serializations, or the copyrights therein. Neither
2 Grosset & Dunlap, Inc. nor Cooper ever owned or held any title
3 or interest in the Novel or copyright therein as trustee, con-
4 structive or otherwise, for Wallace, the Wallace Estate, Edgar
5 Wallace, Ltd. or Frere.

6 6. The purported renewal of copyright in the Novel by
7 Frere was invalid, and the Certificate of Registration of a Claim
8 to Renewal Copyright issued to her was and is of no force or
9 validity.

10 7. The publication of the Story in the Mystery Maga-
11 zine Serializations and the Novel divested the Story of common
12 law copyright protection. After such publication, the only
13 protection for the Story as contained in the Mystery Magazine
14 Serializations and the Novel was under the Copyright Act of the
15 United States. The Motion Picture is a derivative work, having
16 been published and copyrighted subsequent to the publication
17 and copyright of the Novel and the Mystery Magazine Serializa-
18 tions. Consequently, from and after the time that the Novel
19 and Mystery Magazine Serializations entered the public domain,
20 only the copyrightable matter in the Motion Picture which is
21 not contained in the Novel or Mystery Magazine Serializations
22 has been and is protected by RXO's copyright and renewal copy-
23 right in the Motion Picture.

24 8. Universal may produce, sell, distribute and ex-
25 hibit a motion picture based on and using the Story or elements
26 thereof so long as Universal does not copy copyrightable matter
27 contained in the Motion Picture but not contained in the Mystery
28 Magazine Serializations or Novel. Such a motion picture will
29 not infringe upon the copyright in RXO's Motion Picture or upon
30 any other of defendants' rights.

31 9. Universal is entitled to judgment in its favor
32 on the Complaint.

1 To the extent that any of the Findings of Fact set
2 forth above are deemed to be Conclusions of Law, or to the ex-
3 tent that any of the foregoing Conclusions of Law are deemed
4 to be Findings of Fact, the same shall be deemed Conclusions
5 of Law or Findings of Fact, as the case may be.
6

7 RKO'S COUNTERCLAIM - COUNT I

8 FINDINGS OF FACT

9 1. Findings of Fact Nos. 1 through 25, inclusive,
10 under the heading "Universal's Complaint," are hereby referred
11 to and are incorporated herein in full by this reference.
12

13 2. In or about August, 1975, Universal employed
14 Robert "Bo" Goldman ("Goldman"), a professional screenwriter,
15 to write a screenplay using elements of the Story.
16

17 3. After his employment by Universal but before he
18 commenced writing his screenplay, Goldman viewed the Motion
19 Picture. He made a tape recording of the soundtrack thereof
20 on his own initiative, and was not instructed to do so by
21 Universal. Neither Goldman nor Universal published, performed,
22 distributed, disseminated, sold or offered for sale or hearing
23 Goldman's tape recording to the public.
24

25 4. Goldman delivered a screenplay written by him to
26 Universal which was revised as of November 21, 1975 (the "Gold-
27 man Screenplay").
28

29 5. After November 21, 1975, the Goldman Screenplay
30 was further revised for the purpose, among others, of deleting
31 from it all material which is found only in the Motion Picture
32 and not in the Novel or Mystery Magazine Serializations. After
33 November 21, 1975, all such material was deleted from the
34 Goldman Screenplay.
35

36 6. The final draft of the Goldman Screenplay does
37 not contain any material or elements which are found only in the
38

1 Motion Picture and not in the Novel or Mystery Magazine Seriali-
2 zations.

3 7. Universal at all times had RKO's consent to pro-
4 duce, sell and distribute a motion picture copying the Motion
5 Picture or any portions thereof, by reason of the following:

6 (a) On April 15, 1975, Universal, by and through
7 its authorized agent, Arnold Shane ("Shane"), and RKO, by and
8 through its authorized agent, Daniel T. O'Shea ("O'Shea"), enter-
9 ed into a valid oral contract by which Universal acquired an ex-
10 clusive license from RKO to produce, sell and distribute under
11 the title "King Kong" a remake of the Motion Picture and an option
12 to produce, sell and distribute a sequel thereto and to utilize
13 in such remake and sequel all or any portion of the Motion Pic-
14 ture (the "April 15, 1975 contract"). The terms of said contract
15 are contained in a two-page typed memorandum dated April 15,
16 1975, entitled "Outline of Deal with RKO GENERAL" (the "Deal
17 Memo") (Exhibit 93) and Universal's standard net profits rider
18 (Exhibit 98), both of which were delivered to O'Shea. O'Shea was
19 authorized by RKO to enter into said contract on behalf of RKO.

20 (b) At all times from 1961 through December 31,
21 1975, RKO expressly granted to O'Shea, orally and by its con-
22 duct, full authority to enter into contracts, oral and written
23 for the sale and licensing of rights in the Motion Picture and
24 in RKO's other literary properties and motion pictures. At all
25 times from 1961 through December 31, 1975, RKO, by its actions
26 and conduct during said period, caused O'Shea reasonably to be-
27 lieve, and O'Shea at all such times did reasonably believe,
28 that O'Shea had such authority; and at all such times O'Shea
29 had and exercised such authority.

30 (c) RKO, in its actions and conduct during the
31 period from 1961 through December 31, 1975, caused third
32 parties, including Universal in entering into the April 15,

*Memo. Shane and O'Shea further agree
that the four year period referred to in
paragraphs 4 and 5 of the two page typed
memorandum so referred to shall be one and one-half years.*

1 1975 contract, to rely upon the authority of O'Shea to nego-
2 tiate and enter into contracts on behalf of RKO for the sale and
3 license of rights in the Motion Picture and RKO's other literary
4 properties and motion pictures. At no time did RKO notify
5 Universal of any limitation upon the authority of O'Shea to
6 enter into such contracts on behalf of RKO; Universal had no
7 knowledge of any such limitation, except that Universal knew
8 that O'Shea consulted with others at RKO before he made such
9 contracts on behalf of RKO.

10 (d) The aforesaid authority of O'Shea to enter
11 into the aforesaid contracts and the April 15, 1975 contract
12 with Universal was not required to be in writing because O'Shea
13 had and exercised the full, actual, ostensible and apparent
14 authority of RKO at all times from 1961 through December 31,
15 1975 to enter into such contracts on behalf of RKO.

16 (e) The April 15, 1975 contract was capable of
17 performance within one year from the date of its making.

18 (f) On the morning of April 16, 1975, John S.
19 Poor, Chairman of the Board of Directors of RKO, acquiesced in
20 the April 15, 1975 contract and thereby ratified such contract.
21 Shane was aware of Poor's acquiescence on the morning of April
22 16, and this was known to Poor and O'Shea. On April 16, 1975,
23 in reasonable reliance upon Poor's acquiescence and upon the
24 aforesaid conduct of RKO and O'Shea, Universal employed Hunt
25 Stromberg ("Stromberg") to produce Universal's "King Kong"
26 motion picture and thereby committed itself to pay, and paid,
27 Stromberg a total salary of \$62,400 (i.e., \$1,200 per week
28 for one year).

29 8. Universal has not published, exhibited, dis-
30 tributed, disseminated, sold or offered for sale or viewing
31 to the public the Goldman Screenplay or any copies or drafts
32 thereof.

9. Universal has not received any revenues or profits from the Goldman Screenplay or any drafts thereof, or from any of Universal's conduct set forth hereinabove.

10. RKO has not lost any revenue or sustained any damage as a result of the writing of the Goldman Screenplay or any of Universal's conduct set forth hereinabove.

11. Universal filed and prosecuted the Complaint and defended RKO's Counterclaim in the above action in good faith and with the true belief that Universal's conduct as described hereinabove would not infringe RKO's copyright in the Motion Picture.

CONCLUSIONS OF LAW

1. Count I of RKO's Counterclaim is a claim by RKO against Universal for copyright infringement, and arises under the Copyright Act of the United States, Title 17, United States Code. The Court has jurisdiction over Count I of RKO's Counterclaim pursuant to the provisions of Title 28, United States Code, Section 1338(a).

2. Conclusions of Law Nos. 2 through 8, inclusive, under the heading "Universal's Complaint" are hereby referred to and are incorporated herein in full by this reference.

3. Neither the Goldman Screenplay nor any element thereof constitutes an infringement of, and Universal has not infringed upon, RKO's copyright in the Motion Picture.

4. The April 15, 1975 contract is valid and subsisting and constitutes consent by RKO to Universal's conduct as set forth in the foregoing Findings of Fact.

5. The statute of frauds is a defense only. The statute of frauds and equal dignities doctrine do not vitiate the effect of RKO's aforesaid oral consent. To the extent that the statute of frauds and equal dignities doctrine could legally

1 vitiate RKO's oral consent, RKO is estopped by its conduct and
2 by the conduct of Poor and O'Shea (a) to assert the defense of
3 the statute of frauds and that the April 13, 1975 contract is in-
4 valid, voidable or unenforceable because it is not in writing,
5 and (b) to deny O'Shea's authority to enter into said contract
6 on behalf of RKO and to assert the equal dignities doctrine with
7 respect to O'Shea's said authority.

8 6. RKO is not entitled to an injunction and is not
9 entitled to damages or any other relief against Universal on
10 Count I of RKO's Counterclaim; Universal is entitled to a
11 judgment in its favor on Count I of said Counterclaim.

12 To the extent that any of the Findings of Fact set
13 forth above are deemed to be Conclusions of Law, or to the ex-
14 tent that any of the foregoing Conclusions of Law are deemed to
15 be Findings of Fact, the same shall be deemed Conclusions of
16 Law or Findings of Fact, as the case may be.

17
18 RKO'S COUNTERCLAIM - COUNT II

19 FINDINGS OF FACT

20 1. Count II of RKO's Counterclaim is a claim by
21 RKO against Universal for unfair competition and arises out of
22 the same facts (or facts substantially related thereto) which
23 support this Court's jurisdiction over Count I of RKO's Counter-
24 claim.

25 2. Findings of Fact Nos. 1 through 25, inclusive,
26 under the heading "Universal's Complaint," and Finding of Fact
27 No. 7 under the heading "RKO's Counterclaim - Count I," are
28 hereby referred to and are incorporated herein in full by this
29 reference.

30 3. RKO has caused the Motion Picture to be distribut-
31 ed and exhibited under RKO's name. ~~RKO has not introduced any~~

32 ~~evidence showing either the duration of such distribution and~~
1045

~~exhibition of the films of the world for films and states~~
the United States, in which such distribution and exhibition
ended.

4. During the past 17 years, many literary properties,
songs and phonograph record albums have been published and
copyrighted by parties other than RKO in the United States
using the name and title "King Kong." The name "King Kong"
has also during such period been used by parties other than
RKO in various printed cartoons and comic strips in the United
States. There is no evidence that any of the aforesaid uses
of the name and title "King Kong" were licensed by RKO.

5. The title "King Kong" ~~is no evidence that the~~ has a
meaning by which the public identifies such title with RKO
or the Motion Picture.

6. The name "King Kong" has become part of the
ordinary English language.

7. In November, 1973, Universal caused a press re-
lease and trade advertisement to be published in which Universal
stated that it intended to produce a motion picture entitled
"The Legend of King Kong," based on the novel "King Kong" by
Delos W. Lovelace.

8. Universal did not pass off its announced motion
picture as being based upon or having any connection with the
Motion Picture. Universal did not deceive the public and there
is no likelihood that the public was confused, into believing
that Universal's announced motion picture was or would be based
upon or have any connection with the Motion Picture. Universal
did not pass off its announced motion picture or deceive the
public, and there is no likelihood that the public was confused,
into believing that Universal's motion picture was connected
with, licensed or sponsored by RKO.

///

1 9. By virtue of RKO's consent to Universal's pro-
2 duction of its motion picture, Universal also had RKO's express
3 and implied consent to publish the press release and trade
4 advertisement referred to above.

10. Publication of Universal's trade advertisement and press release did not dilute the value of any of RKO's claimed rights in the name, title or character "King Kong," nor did such publication disparage or slander any of RKO's claimed rights in the name, title or character "King Kong."

11. Universal has not received any revenues or profits from the publication of its trade advertisement or press release or from the use by Universal of the name and title "King Kong."

12. RKO has not lost any revenue or sustained any damage as a result of the publication of Universal's trade advertisement or press release or as a result of the use by Universal of the name and title "King Kong."

13. Universal did not publish its trade advertisement
or press release or use the name and title "King Kong" with
malice toward RKO or with the intent to vex, harass, annoy or
injure RKO, or with the intent to oppress RKO or to subject RKO
to any hardship in conscious disregard of any rights of RKO.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over Count II of
AXO's Counterclaim under the doctrine of pendant jurisdiction.

2. Conclusions of Law Nos. 2 through 8, inclusive,
under the heading "Universal's Complaint," and Conclusions of
Law Nos. 1, 4 and 5 under the heading "RKO's Counterclaim -
Count I," are hereby referred to and are incorporated herein
in full by this reference.

2 / / /

3. Universal has not diluted or disparaged the value of the name, title or character "King Kong" and has not diluted or disparaged any claimed rights of RKO herein.

4. Since Universal is free to produce and distribute a motion picture based on the Novel and Mystery Magazine serializations, it was and is free to entitle said motion pictures "King Kong" and to advertise its plans to do so in the manner set forth in Findings of Fact Nos. 7 and 8, under the heading "RKO's Counterclaim - Count II."

5. Universal has not unfairly competed with RKO and has not infringed upon any claimed rights of RKO in the name, title or character "King Kong."

6. Universal did not act with malice or oppression toward RKO in engaging in any of the conduct set forth in Findings of Fact Nos. 7 and 8 under the heading "RKO's Counterclaim - Count II."

7. RKO is not entitled to an injunction and is not entitled to compensatory or punitive damages or any other relief against Universal on Count II of RKO's Counterclaim; Universal is entitled to a judgment in its favor on Count II of RKO's Counterclaim.

To the extent that any of the Findings of Fact set forth above are deemed to be Conclusions of Law, or to the extent that any of the foregoing Conclusions of Law are deemed to be Findings of Fact, the same shall be deemed Conclusions of Law or Findings of Fact, as the case may be.

Dated: November 24, 1976

31 AUG 1982

I hereby certify and declare that the foregoing document is a true and correct copy of the original on file in my office, and is my true copy.

CLERK OF DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA



United States District Judge

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10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA

12 UNIVERSAL CITY STUDIOS, INC.,
13 a corporation,

14 Plaintiff,

15 vs.

16 RKO GENERAL, INC., a corporation,
17 DINO DELAURENTIIS CORPORATION, a
18 corporation, and RICHARD COOPER,

19 Defendants.

NO. CV 75-3526-R

FINDINGS OF FACT AND
CONCLUSIONS OF LAW ON
CROSS-COMPLAINT OF
RICHARD COOPER

(Incorporating and
Supplementing Findings
of Fact and Conclusions
of Law Entered on
December 21, 1976)

20 RKO GENERAL, INC., a
21 corporation,

22 Defendant and
23 Counter-Claimant,

24 vs.

25 UNIVERSAL CITY STUDIOS, INC.,
26 a corporation,

27 Plaintiff and
28 Counter-Defendant.

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A002185

1 RICHARD COOPER,
2 Defendant and
3 Cross-Complainant,
4

5 vs.

6 RKO GENERAL, INC.,
7 a corporation,
8

9 Defendant and
10 Cross-Defendant.
11

12 The Cross-Complaint of Defendant and Cross-Complainant
13 Richard Cooper came on regularly for trial before the Court and
14 Without a jury on September 1, 1976, the Honorable Manuel L. Real,
15 United States District Judge presiding. The Defendant and Cross-
16 Complainant, Richard Cooper, appeared by Kadison, Pfaelzer, Woodard,
17 Quinn & Rossi by Richard K. Simon, Esq. and Lee L. Blackman, Esq.;
18 Defendant and Cross-Defendant RKO General, Inc. appeared by Lillick,
19 McEose & Charles by Anthony Liebig, Esq. and Andrew W. Robertson,
20 Esq.; and Plaintiff and Counter-Defendant Universal City Studios
21 appeared by Rosenfeld, Meyer & Susman by Stephen Kroft, Esq. and
22 by Gang, Tyre & Brown by Stanley P. Gold, Esq. Having considered
23 the oral and documentary evidence, the stipulations of counsel and
24 pretrial memoranda, and having heard argument of counsel, the
25 Court made and entered Findings of Fact and Conclusions of Law and
26 entered an Interlocutory Judgment on December 21, 1976, thereby
27 determining certain issues of liability in favor of Richard Cooper
28 and referring the matter to a Special Master to take and report an
29 accounting of Richard Cooper's damages. The Court, having con-
sidered the Special Master's Proposed Findings of Fact and Con-
clusions of Law and Final Report, the transcript of proceedings

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1 before the Special Master, the documentary evidence, stipulations,
2 and pleadings submitted to the Special Master, the pleadings,
3 records, and files herein and the arguments of counsel, and being
4 duly advised in the premises now makes its final Findings of Fact
5 and Conclusions of Law on the Cross-Complaint of Richard Cooper,
6 incorporating and supplementing its Findings and Conclusions as
7 entered on December 21, 1976, as follows:

8
9 FINDINGS OF FACT

10
11 1. Defendant and Cross-Complainant Richard Cooper is a
12 resident of the State of California. He is the son and heir of
13 Merian C. Cooper and, as has been stipulated by the parties, is
14 the sole legal owner of all of the rights held by Merian C. Cooper
15 during his life in and to the properties and interests more fully
16 described herein.

17
18 2. Defendant and Cross-Defendant RKO General, Inc. is
19 a corporation organized and existing under the laws of the State
20 of Delaware and qualified to do, and doing, business in the State
21 of California and is the successor in interest to all of the
22 rights of its predecessor corporation RKO Radio Pictures, Inc.
23 RKO General, Inc. and RKO Radio Pictures, Inc. are hereafter
24 referred to jointly as "RKO".

25
26 3. Merian C. Cooper, the father of the Cross-Complain-
27 ant herein, was in the years 1924 and thereafter the producer and
28 director of documentary-expeditionary motion picture photoplays.

1 4. During the years 1924 through 1931, Merian C.
2 Cooper became interested in producing a motion picture involving
3 the central character of a giant gorilla. In furtherance of that
4 goal he conducted substantial research into various species of
5 gorillas and their habits with the assistance of his secretary
6 Dagmar Matson (later Dagmar Stickle).
7

8 5. In the years 1929 and 1930, Merian C. Cooper dis-
9 cussed the making of the aforesaid motion picture with several
10 persons including Mr. Douglas Burden, then a trustee of the
11 American Museum of Natural History. Mr. Burden had recently
12 returned from an expedition to the Island of Komodo in the Dutch
13 East Indies. He and Merian C. Cooper discussed the expedition at
14 length, and in particular, discussed the fact that Burden had
15 taken his wife to that island and that almost prehistoric animals,
16 the "dragon lizards", continued to survive there. They also
17 discussed the fact that the several Komodo lizards which were
18 returned to the United States for exhibition had survived but a
19 short period of time before being "destroyed by civilization".
20

21 6. Sometime during the years 1929, 1930 and prior to
22 October, 1931, Merian C. Cooper reduced his ideas for the "gorilla"
23 motion picture to original written expressions in the form of two
24 or three rough treatments running fifteen to twenty pages in
25 length. The story was then entitled "Kong" and involved the
26 bringing of a giant gorilla back to New York City and having him
27 killed there by "civilization".
28

1 7. Prior to October, 1931 Merian C. Cooper conceived
2 of the name "Kong" to identify the giant gorilla he had created.
3 During this period of time, he also conceived of the idea of the
4 giant gorilla standing at the top of the Empire State Building
5 making a "last stand" against attacking airplanes while attempting
6 to protect the beautiful American girl he loved.

7
8 8. Prior to October, 1931 Merian C. Cooper disclosed
9 his "Kong" story to several persons including David Bruce and
10 David O. Selznick. He also discussed the possibility of making a
11 motion picture based upon that story with a representative or
12 representatives of Paramount Pictures.

13
14 9. In or about October, 1931 David O. Selznick was
15 appointed Head of Production for RKO in Hollywood. Before
16 Selznick's departure from New York for Hollywood David Bruce,
17 David Selznick and Merian C. Cooper discussed Cooper's ideas for a
18 "Kong" motion picture and it was decided that Merian C. Cooper
19 would go to Hollywood to talk to Mr. Selznick about it after
20 Selznick had taken over his new position.

21
22 10. In October of 1931 Merian C. Cooper traveled to
23 Hollywood and formally proposed the making of his "Kong" motion
24 picture to David Selznick. While this proposed motion picture was
25 being considered by RKO, and before Merian C. Cooper had been
26 placed on salary or employed by RKO, Merian C. Cooper had several
27 artists prepare a number of sketches under his direction illustra-
28 ting scenes from his story. Among the illustrations was one

1 depicting airplanes shooting at the giant gorilla who was standing
2 on the Empire State Building holding a beautiful girl in his hand.

3
4 11. Prior to being employed by RKO, Merian C. Cooper
5 showed his treatments of the "Kong" story and the aforesaid illus-
6 trations to David O. Selznick, who approved the making of a test
7 sequence based on a portion of that story.

8
9 12. On or about November 10, 1931 Merian C. Cooper met
10 with Fay Wray. In that meeting he discussed the "Kong" motion
11 picture project and showed her several sketches of scenes from the
12 proposed motion picture including one of "Kong" on the Empire
13 State Building. He told her that the story would be about an
14 expedition going to some remote place and capturing an extraordi-
15 nary creature who would be returned to New York. He also told her
16 that he needed a blonde to play against the dark gorilla and that
17 the gorilla would be shown through miniatures rather than by using
18 a live gorilla.

19
20 13. Subsequent to November 10, 1931 and prior to January
21 1932, Merian C. Cooper began direction of an initial test sequence
22 for the "Kong" motion picture which, after production, was substan-
23 tially incorporated into the final motion picture.

24
25 14. On January 9, 1932 Merian C. Cooper executed an
26 employment contract with RKO.

1 15. Merian C. Cooper was not an employee of RKO prior
2 to January 9, 1932, although he acted as a consultant to David O.
3 Selznick.

4
5 16. Prior to January 9, 1932 RKO had no power, author-
6 ity or right to direct or control the work done by Merian C.
7 Cooper with respect to the story of "King Kong" or the filming
8 thereof.

9
10 17. The name, character, and story "King Kong" were not
11 created for RKO by Merian C. Cooper as works for hire.

12
13 18. No rights of any kind to use or license the use of
14 the character, name, and/or story "King Kong" were conveyed to RKO
15 by the January 9, 1932 employment agreement.

16
17 19. On January 23, 1932 Merian C. Cooper executed an
18 "Assignment" with reference to the "Kong" story. As of that date,
19 the essential elements of the story, as ultimately embodied in the
20 RKO motion picture photoplay "King Kong", had been created by
21 Merian C. Cooper, and actual production of that motion picture
22 photoplay had begun.

23
24 20. The January 23, 1932 "Assignment" granted RKO only
25 the right to produce one motion picture photoplay using the char-
26 acter, name, and story "King Kong", and the parties thereto so
27 understood.

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1 21. All rights not specifically granted to RKO in the
2 January 23, 1932 Assignment were reserved by the assignors.

3
4 22. RKO was not granted the right to use or license the
5 use of the character, name, and/or story "King Kong" in connection
6 with sequels to the RKO motion picture "King Kong" by the January
7 23, 1932 Assignment.

8
9 23. RKO was not granted the right to use or license the
10 use of the character, name, and/or story "King Kong" in connection
11 with remakes of the RKO motion picture "King Kong" by the January
12 23, 1932 Assignment.

13
14 24. RKO was not granted the right to use or license the
15 use of the character, name, and/or story "King Kong" in connection
16 with the production, distribution, sale, or promotion of toys,
17 games, books, pictures, models, or any other form of merchandising
18 by the January 23, 1932 Assignment.

19
20 25. Among the "good and valuable consideration" tendered
21 by RKO in the January 23, 1932 Assignment was the implied promise
22 that RKO would not exploit any of the rights which were not spec-
23 ifically conveyed to RKO therein.

24
25 26. The motion picture photoplay "King Kong" was com-
26 pleted in 1933 and first published on February 24, 1933.

1 27. On June 15, 1933 Merian C. Cooper executed an
2 Assignment with respect to a sequel to "King Kong", originally
3 titled "Jamboree" and later titled "Son of Kong". By this Assign-
4 ment RKO was granted the right to product a single motion picture
5 photoplay sequel to the motion picture "King Kong", and all other
6 rights were reserved by Merian C. Cooper.

7
8 28. The Assignments of January 23, 1932 and June 15,
9 1933 and the Employment Agreement of January 9, 1932 were prepared
10 by or for RKO. There is no evidence that Merian C. Cooper was
11 represented by and did consult with counsel prior to the execution
12 of any of these documents.

13
14 29. On October 28, 1935 Mr. Daniel O'Shea, the attorney
15 in charge of the Legal Department of the RKO Studio in Los Angeles,
16 was asked by RKO to analyze the Assignment of January 23, 1932 and
17 in that analysis acknowledged with respect to sequel rights that
18 the language of that Assignment was neither clear nor definitive.

19
20 30. On November 11, 1952 an attorney employed by RKO
21 was asked by RKO to analyze the Assignment of January 23, 1932 and
22 in that analysis acknowledged that Merian C. Cooper reserved all
23 rights not specifically granted, including the rights to novelize,
24 dramatize, and publish the story.

25
26 31. Since 1932 RKO has granted licenses or permissions
27 for, or has otherwise allowed or approved, the making of motion
28 pictures using the name, character, and/or story of "King Kong",

1 including "King Kong vs. Godzilla" (1963); "King Kong Escapes"
2 (1968); "King Kong" (1966 - an animated cartoon T.V. film series)
3 and "King Kong" (licensed in 1975 - released in 1976).

4
5 32. Since 1932, and to the present date, RKO has granted
6 licenses or permissions for, or has otherwise allowed or approved,
7 the use of the name, character, and/or story "King Kong" in connec-
8 tion with the production, distribution, sale, or promotion of
9 toys, games, books, pictures, models, and other forms of merchan-
10 dising.

11
12 33. Merian C. Cooper did not learn of RKO's merchandis-
13 ing of the character, name, and story "King Kong" until 1964 when
14 the motion picture "King Kong vs. Godzilla" was released and a toy
15 model of the "King Kong" character was distributed by Aurora
16 Plastics, both licensees of RKO.

17
18 34. Immediately after receiving notice that RKO was
19 engaging in such licensing activities Merian C. Cooper informed
20 RKO that these activities were violative of his rights in the
21 character, name, and story "King Kong" which he informed RKO
22 encompassed all of the licensing being undertaken by RKO with
23 regard to the merchandising of the character, name, and story
24 "King Kong" and the licensing of any new motion picture utilizing
25 the character, name, or story of "King Kong".

26
27 35. Merian C. Cooper's assertion of his rights continued
28 until his death on April 21, 1973 and RKO had notice of Merian C.

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1 Cooper's assertion that he was the original creator and exclusive
2 owner of the name, character, and story "King Kong" and that the
3 only rights ever granted by him to RKO were the rights to exhibit
4 and exploit the original "King Kong" motion picture and the motion
5 picture sequel "Son of Kong".
6

7
8 36. Neither Merian C. Cooper nor Richard Cooper con-
9 sented to, approved, or permitted RKO's licensing of the use of
10 the name, character, or story "King Kong" in connection with any
11 motion picture subsequent to the 1933 RKO motion picture, other
12 than "Son of Kong", or in connection with the production, distri-
13 bution, sale, or promotion of any toys, games, books, pictures,
14 models, or any other form of merchandising.
15

16
17 37. Neither Merian C. Cooper nor Richard Cooper aban-
18 doned their claimed rights in and to the name, character, and
19 story "King Kong".
20

21
22 38. Neither Merian C. Cooper nor Richard Cooper waived
23 their claimed rights in and to the name, character, and story
24 "King Kong".
25

26
27 39. Neither Merian C. Cooper nor Richard Cooper acted
28 toward or made statements to RKO which could reasonably have led
29 RKO to believe that either had relinquished, abandoned, or waived
30 their claimed rights in and to the name, character, and story
31 "King Kong".
32

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1 40. Neither Merian C. Cooper nor Richard Cooper acted
2 toward or made statements to RKO which could reasonably have led
3 RKO to believe that either agreed to, approved, consented to, or
4 permitted RKO to license the name, character, or story "King Kong"
5 in connection with any motion picture subsequent to the 1933 RKO
6 motion picture, other than "Son of Kong", or in connection with
7 the production, distribution, sale, or promotion of any toys,
8 games, books, pictures, models, or any other form of merchandising.
9

10 41. From May 10, 1972 (the first date after which
11 Richard Cooper may recover damages under the applicable statute of
12 limitations) to December 31, 1976 RKO received revenues of \$39,712
13 from merchandising unrelated to that undertaken pursuant to the
14 1975 license granted to the Dino DeLaurentiis Corporation (referred
15 to in Finding of Fact number 31). Fifteen percent (15%) of said
16 \$39,712 (or \$5,956.80) is deductible as commissions and other
17 expenses related to such revenue, leaving a profit in the amount
18 of \$33,755.20.
19

20 42. RKO has received payments from or on behalf of Dino
21 DeLaurentiis Corporation ("EDLC") in connection with the
22 DeLaurentiis remake of "King Kong" and related merchandising
23 (hereinafter sometimes the "EDLC remake"), between May 10, 1972
24 and October 31, 1977, in the amount of \$1,685,800.32.
25

26 43. In connection with its prosecution of RKO General
27 Inc. and Dino DeLaurentiis Corporation v. Dexter Films, Inc. et
28 al. High Court of Justice, Chancery Division, London, England.

1 filed November 1, 1976, RKO paid the following legal fees and
2 expenses as of October 31, 1977:

3
4 • (a) Fees and expenses paid to Regan, Goldfarb,
5 Heller, Wetzler & Quinn -- \$12,602.09.

6
7 (b) Fees and expenses paid to Wilde, Sapte &
8 Co. -- \$15,274.59.

9
10 (c) Fees and expenses paid to Coudert Brothers
11 -- \$4,235.65.

12
13 (d) Fees and expenses paid to William Rith (Liter-
14 ary expert) -- \$392.50.

15
16 (e) Commission for English Injunction Bond --
17 \$1,000.60.

18
19 Said fees and expenses were reasonable under the circumstances,
20 and are properly deductible from revenues to determine RKO's
21 profits from the DDLC remake.

22
23 44. In connection with its prosecution of RKO General
24 Inc. v. Key International Film Distributors, Inc., United States
25 District Court, District of Colorado, No. CV-A-366, filed April 5,
26 1976, RKO paid the following fees and expenses as of October 31,
27 1977:

1 (a) Fees and expenses paid to Regan, Goldfarb,
2 Heller, Wetzler & Quinn -- \$9,144.50.

3
4 (b) Fees and expenses paid to Holland & Hart --
5 \$2,543.52.

6
7 said fees and expenses were reasonable under the circumstances,
8 and are properly deductible from revenues to determine RKO's
9 profits from the DDLC remake.

10
11 45. In connection with its prosecution of RKO General,
12 Inc. v. Paul Leder, United States District Court, Central District
13 of California, No. CV 76-1223-R, filed April 14, 1976, RKO paid
14 the following fees and expenses as of October 31, 1977:

15
16 (a) Fees and expenses paid to Regan, Goldfarb,
17 Heller, Wetzler & Quinn -- \$1,072.50.

18
19 (b) Fees and expenses paid to Lillick, McHose &
20 Charles -- \$9,719.09.

21
22 said fees and expenses were reasonable under the circumstances,
23 and are properly deductible from revenues to determine RKO's
24 profits from the DDLC remake.

25
26 46. In connection with its opposition to the Applica-
27 tion for Trademark Registration of H. H. Brown Shoe Co., United
28 States Patent & Trademark Office, filed February 9, 1976, RKO paid

1 the following legal fees and expenses as October 31, 1977:
2

3 (a) Fees and expenses paid to Coudert Brothers
4 -- \$8,324.99.
5

6 said fees and expenses were reasonable under the circumstances,
7 and are properly deductible from revenues to determine RKO's
8 profits from the DDLC remake.
9

10 47. RKO paid the following fees and expenses to Rogers-
11 Rowland, Toronto, Canada in connection with "King Kong" copyright
12 registration in Canada and injunctive relief against a cartoon
13 book published in Canada -- \$223.24. Said fees and expenses were
14 reasonable under the circumstances and are properly deductible
15 from revenues to determine RKO's profits from the DDLC remake.
16

17 48. (a) RKO paid legal fees and expenses to Coudert
18 Brothers "re general advices" in connection with the DDLC remake
19 in the amount of \$1,628.47 as of October 31, 1977.
20

21 (b) RKO paid legal fees and expenses to Youngman,
22 Hungate & Leopold "regarding the DDLC contract" in the amount of
23 \$1,825.00 as of October 31, 1977.
24

25 Said fees and expenses were reasonable under the circumstances and
26 are properly deductible from revenues to determine RKO's profits
27 from the DDLC remake.
28

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1 49. As of October 31, 1977, RKO has paid fees to Ernst
2 & Ernst for an accounting of the financial statements rendered by
3 DDLC in connection with the DDLC remake of "King Kong" in the
4 amount of \$2,950.00. Said expenses were reasonable under the
5 circumstances and are properly deductible from revenues to deter-
6 mine RKO's profits from the DDLC remake.

7
8 50. RKO incurred direct overhead expenses in connection
9 with "King Kong" matters as of October 31, 1977 as follows:

10
11 (a) Direct expenses of Arnold Kaufman - \$12,742.52.

12
13 (b) Additional telephone room and mail room
14 expenses incurred by reason of the remake of "King Kong" in the
15 amount of \$1,087.50.

16
17 Said expenses were reasonable under the circumstances and are
18 properly deductible from revenues to determine RKO's profits from
19 the DDLC remake.

20
21 51. RKO has failed to present evidence or to carry its
22 burden of proof with respect to the relatedness, reasonableness
23 and necessity of the legal fees and expenses in the sum of
24 \$66,417.75 paid to Regan, Goldfarb, Heller, Wetzler & Quinn for
25 what RKO characterizes as "preparation and administration of con-
26 tracts involving the 'King Kong' remake, including merchandising,
27 protection of the title in the Motion Picture Association of
28 America, registration procedures, policing of unauthorized uses of

1 King Kong title, name and character, trademark problems and related
2 matters". RKO has also failed to demonstrate what portion or
3 portions of the above expenses were incurred in connection with
4 the non-DDLC merchandising income. Said fees and expenses are,
5 therefore, not deductible from revenues to determine RKO's profits
6 from the DDLC remake.

7
8 52. RKO paid Sidney Korshak, Esq., in connection with
9 the Universal-RKO litigations referred to herein, the sum of
10 \$50,000.00. Said fees and expenses were not reasonable under the
11 circumstances and are not properly deductible from revenues to
12 determine RKO's profits from the DDLC remake.

13
14 53. RKO reimbursed Regan, Goldfarb, Heller, Wetzler &
15 Quinn for its cash disbursements in connection with the various
16 referenced litigations, in the amount of \$11,295.30. RKO has
17 failed to present evidence or to carry its burden of proof with
18 respect to the relatedness, reasonableness and necessity of the
19 cash disbursements reimbursed to Regan, Goldfarb, Heller, Wetzler
20 & Quinn in connection with the various litigations. RKO has also
21 failed to demonstrate what portion, if any, of those cash dis-
22 bursements were paid in connection with the Universal/RKO litiga-
23 tions. Said cash disbursements are, therefore, not deductible
24 from revenues to determine RKO's profits from the DDLC remake.

25
26 54. With the exception of the expenses identified in Finding
27 of Fact number 50(b), RKO did not incur any expenses in the nature
28 of overhead, including without limitation rent, maintenance or

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1 utilities, by reason of the DDLC remake of "King Kong" which it
2 would not have incurred in the ordinary course of its business had
3 that remake not been produced or the DDLC contract not been entered
4 into. RKO has failed to produce evidence or to carry its burden
5 of proof with respect to such portions of its claimed "overhead"
6 expenses or other claimed deductions.

7
8 55. RKO's withdrawal from distribution of the original
9 motion picture photoplay "King Kong" was entirely voluntary and
10 not compelled by its agreement with DDLC and not required by the
11 ordinary course of business. Any losses allegedly sustained by
12 RKO as a result of this withdrawal are not deductible from reve-
13 nues to determine RKO's profits from the DDLC remake.

14
15 56. The actions entitled Universal City Studios, Inc.
16 v. RKO General, Inc., Dino DeLaurentiis Corporation, Dino
17 DeLaurentiis (Los Angeles Superior Court Case No. 125 242) and
18 Universal City Studios, Inc. v. RKO General, Inc., Dino
19 DeLaurentiis Corporation, Richard Cooper, (United States District
20 Court, Central District of California Case No. CV-75-3526-R) were
21 each commenced as a sole and direct result of the contract entered
22 into between Universal and RKO (per Findings of Fact and Conclu-
23 sions of Law on Count I of RKO's Counter-Claim herein) and RKO's
24 rejection of same. Expenses related to the above-entitled actions
25 were not reasonably or necessarily incurred and arose out of a
26 transaction wholly separate from that creating RKO's remake income
27 and are not deductible from revenues to determine RKO's profits
28 from the DDLC remake.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this Cross-Complaint pursuant to Title 28 U.S.C. sections 1332, 1338, and 2201 and the doctrine of pendant jurisdiction.

2. The name, character, and story "King Kong" were not created for RKO by Merian C. Cooper as works for hire.

3. No rights of any kind to use or license the use of the character, name, and/or story "King Kong" were conveyed to RKO by the January 9, 1932 employment agreement.

4. The January 23, 1932 Assignment granted RKO the right to produce one motion picture photoplay using the character, name, and story "King Kong".

5. All rights not specifically granted to RKO in the January 23, 1932 Assignment were reserved by the assignors.

6. RKO was not granted the right to use or license the use of the character, name, and/or story "King Kong" in connection with sequels to the RKO motion picture "King Kong" by the January 23, 1932 Assignment.

7. RKO was not granted the right to use or license the use of the character, name, and/or story in connection with remakes of the RKO motion picture "King Kong" by the January 23, 1932

1 Assignment.

2

3 8. RKO was not granted the right to use or license the
4 use of the character, name, and/or story "King Kong" in connection
5 with the production, distribution, sale, or promotion of toys,
6 games, books, pictures, models, or any other form of merchandising
7 by the January 23, 1932 Assignment.

8

9 9. Prior to his death, and as between RKO and Merian
10 C. Cooper, Merian C. Cooper was the sole owner of all rights in
11 and to the use of the character, name, and story "King Kong" with
12 the exception of the right to produce a single motion picture
13 entitled "King Kong", which right was conveyed to RKO, and the
14 right to produce a sequel to said motion picture which was entitled
15 "Son of Kong", which right was also conveyed to RKO.

16

17 10. After the death of Merian C. Cooper, and as between
18 RKO and Richard Cooper, Richard Cooper was the sole owner of all
19 rights in and to the use of the character, name, and story "King
20 Kong".

21

22 11. The Agreement of January 23, 1932 contained an
23 implied promise that RKO would not exploit any of the rights not
24 specifically conveyed to RKO.

25

26 12. The licensings by RKO of the use of the character,
27 name, and story "King Kong" in sequels to the original motion
28 picture, other than "Son of Kong", constitute breaches of the

1 express and implied terms of the Assignment of January 23, 1932.
2

3 13. The licensing by RKO of the character, name, and
4 story "King Kong" for use in a remake of the original motion
5 picture constitutes a breach of the express and implied terms of
6 the Assignment of January 23, 1932.
7

8 14. The licensings by RKO of the use of the character,
9 name, and/or story "King Kong" in connection with the production,
10 distribution, sale, and promotion of toys, games, books, pictures,
11 models, and every other form of merchandising constitute breaches
12 of the express and implied terms of the Assignment of January 23,
13 1932.
14

15 15. The profits made and licenses obtained by RKO by
16 reason of the breaches referred to in Conclusions of Law numbers
17 12, 13, and 14 were wrongfully obtained and have been wrongfully
18 withheld from Merian C. Cooper and Richard C. Cooper.
19

20 16. Richard Cooper is not estopped to assert his claims
21 for declaratory relief, for an accounting, and for damages.
22

23 17. The claims of Richard Cooper are not barred by the
24 doctrine of laches.
25

26 18. By reason of the wrongful conduct of RKO in obtain-
27 ing and retaining the profits and licenses referred to in Conclu-
28 sion of Law number 15, RKO holds the aforesaid profits and licenses
29

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1 as constructive trustee for the sole benefit of Richard Cooper.

2

3 19. Richard Cooper is entitled to an accounting for and
4 payment of all profits earned by RKO from its licensings of the
5 character, name, and/or story "King Kong" for use in sequels
6 (excluding "Son of Kong") and remakes of the original motion
7 picture and for the use in connection with the production, dis-
8 tribution, sale, and promotion of toys, games, books, pictures,
9 models, and/or any other form of merchandising.

10

11 20. Richard Cooper is entitled to a declaration that
12 RKO was not granted, and did not and does not have, any rights to
13 the use of the story, character, or name of "King Kong" other than
14 in connection with the production and release of the motion picture
15 "King Kong" and the motion picture "Son of Kong"; that RKO was not
16 granted, and did not and does not have the right to license the
17 story, character, or name "King Kong" for merchandising or any
18 other purposes; that as between Richard Cooper and RKO, Richard
19 Cooper is the sole owner of all such rights in and to the story,
20 character, and name "King Kong"; and that RKO holds all monies and
21 licenses heretofore or hereafter received or executed as a result
22 of the exercise of licensing of rights to the use of the story,
23 character, or name "King Kong" as trustee for and on behalf of
24 Richard Cooper.

25

26 21. Richard Cooper's damages for the period between May
27 10, 1972 (the first date after which Richard Cooper may recover
28 damages under the applicable statute of limitations) and December

1 31, 1976, on account of RKO's non-DDLC merchandising, are \$33,755.20,
2 plus interest at the legal rate from that date.
3

4 22. Richard Cooper's damages, for all periods after
5 December 31, 1976, on account of RKO's non-DDLC merchandising,
6 shall be eighty-five percent (85%) of the gross non-DDLC mer-
7 chandising income received by RKO, plus interest at the legal rate
8 from the date of each subsequent receipt.
9

10 23. Richard Cooper's damages for the period between May
11 10, 1972 and October 31, 1977, on account of the DDLC remake of
12 "King Kong" and related merchandising, are \$1,601,033.56, plus
13 interest at the legal rate from October 31, 1977.
14

15 24. Richard Cooper's damages, for all periods after
16 October 31, 1977, on account of the DDLC remake and related mer-
17 chandising, shall be RKO's gross income therefrom:
18

19 (a) Less expenses actually incurred after October
20 31, 1977 in connection with those matters identified in Findings
21 of Fact numbers 43, 44, 45, 46, 47, 48, 49, and 50;
22

23 (b) Less fees and expenses actually paid after
24 October 31, 1977 to such accounting firm or firms as RKO may
25 employ for the purpose of auditing DDLC's statements;
26

27 (c) Plus interest at the legal rate on the net sum
28 payable, to be computed separately for each period during which
29

1 RKO receives payments from DDLC.

2

3 25. These Findings of Fact and Conclusions of Law
4 declare the rights as between Richard Cooper and RKO and do not
5 affect any other entity or person.

6

7 To the extent that any of the Findings of Fact set forth
8 above are deemed to be Conclusions of Law, and to the extent that
9 any of the foregoing Conclusions of Law are deemed to be Findings
10 of Fact, the same shall be deemed to be Conclusions of Law or
11 Findings of Fact as the case may be.

12

13 Dated: March 14, 1979

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UNITED STATES DISTRICT JUDGE

31 AUG 1982
I hereby attest and certify
that the foregoing document is a full, true and correct
copy of the original on file in my office, and in my
legal custody.
CLERK U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By 



1920

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9601 Wilshire Boulevard
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Telephone: (213) 858-7700

Attorneys for Plaintiffs and
Counterdefendant UNIVERSAL
CITY STUDIOS, INC.

FILED

JAN 5 1981

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNIVERSAL CITY STUDIOS, INC.,
a corporation,

Plaintiff,

vs.

RKO GENERAL, INC., a corporation,
et al.,

Defendants.

RKO GENERAL, INC., a corporation,

Defendant and Counterclaimant,

vs.

UNIVERSAL CITY STUDIOS, INC., a
corporation,

Plaintiff and Counterdefendant.

RICHARD COOPER,

Defendant and Cross-Complainant,

vs.

RKO GENERAL, INC., a corporation,

Defendant and Cross-Defendant.

NO. CV 75-3526-R

ORDER

ENTERED

JAN 6 1981

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

A002209

The above-captioned matter came on regularly for hearing pursuant to an Order of the Court of Appeals for the Ninth Circuit issued on October 8, 1980, and spread upon the minutes of this Court on November 24, 1980, before the Court on Monday, December 15, 1980, the Honorable Manuel L. Real, Judge presiding, and the plaintiff having appeared by its counsel, Rosenfeld, Meyer & Susman and Stephen A. Kroft, and defendant Richard Cooper having appeared by his counsel, Kadison, Pfaelzer, Woodard, Quinn & Rossi and Richard Simon and Lee Blackman and no appearance having been made on behalf of defendant RKO General, Inc., and the Court having considered the October 8, 1980, Order of the Court of Appeals and Defendant Cooper's request for attorneys' fees and costs in connection therewith, and having heard argument of counsel, and good cause appearing therefor,

IT IS HEREBY ORDERED that:

1. The Judgment of this Court previously entered herein on March 21, 1979, in favor of Richard Cooper, cross-claimant and against RKO General, Inc., cross-defendant, and vacated by the October 8, 1980, Order of the Court of Appeals shall be reinstated. A duplicate original of said Judgment, which has been signed by the Court concurrently herewith, shall be filed and entered by the Clerk forthwith.

2. The Complaint previously filed herein against defendant Richard Cooper, having become moot by reason of settlement agreements between plaintiff and each of defendants, is hereby dismissed without prejudice, each party to bear its own costs in connection with prosecuting and defending the Complaint.

3. Defendant Richard Cooper's request for an order

A002210

1 requiring plaintiff to pay his attorneys' fees and costs as a
2 condition to the dismissal ordered in Paragraph 2 hereof is
3 denied.

4 DATED: JAN 5 1981

5
6 MANUEL L. REAL

7 MANUEL L. REAL
8 UNITED STATES DISTRICT JUDGE
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ENTERED

JAN 6 1981

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY

FILED

JAN 5 1981

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNIVERSAL CITY STUDIOS, INC.,
a corporation,

Plaintiff,

vs.

RKO GENERAL, INC., a corporation,
DINO DeLAURENTIIS CORPORATION, a
corporation, and RICHARD COOPER,

Defendants.

RKO GENERAL, INC., a
corporation,

Defendant and
Counter-Claimant,

vs.

UNIVERSAL CITY STUDIOS, INC.,
a corporation,

Plaintiff and
Counter-Defendant.

NO. CV 75-3526-R

FINAL JUDGMENT FOR
DAMAGES ON CROSS-
COMPLAINT OF RICHARD
COOPER

A002213

1 RICHARD COOPER,

2 Defendant and
3 Cross-Complainant,

4 vs.

5 RKO GENERAL, INC.,
6 a corporation,

7 Defendant and
8 Cross-Defendant.

9 The Cross-Complaint of Defendant and Cross-Complainant
10 Richard Cooper came on regularly for trial before the Court,
11 without a jury, on September 1, 1976, the Honorable Manuel L.
12 Real, United States District Judge presiding. Defendant and
13 Cross-Complainant, Richard Cooper, appeared by Kadison, Pfaelzer,
14 Woodard, Quinn & Rossi by Richard K. Simon, Esq. and Lee L.
15 Blackman, Esq.; Defendant, Counter-Claimant, and Cross-Defendant
16 RKO General, Inc. ("RKO") appeared by Lillick, McHose & Charles by
17 Anthony Liebig, Esq. and Andrew W. Robertson, Esq.; and Plaintiff
18 and Counter-Defendant Universal City Studios, Inc. appeared by
19 Rosenfeld, Meyer & Susman by Stephen Kroft, Esq. and Gang, Tyre &
20 Brown by Stanley P. Gold, Esq. The Court, having considered the
21 oral and documentary evidence, the stipulations of counsel, the
22 pretrial memoranda, and having considered the argument of counsel,
23 made and entered Findings of Fact and Conclusions of Law and
24 entered an Interlocutory Judgment on December 21, 1976, thereby
25 determining certain issues of liability in favor of Richard Cooper
26 and referring the matter to a Special Master to take and report an
27 accounting of Richard Cooper's damages. The Court, having con-
28 sidered the Special Master's Proposed Findings of Fact and Con-

1 clusions of Law and Final Report, the transcript of proceedings
2 before the Special Master, the documentary evidence, stipulations,
3 and pleadings submitted to the Special Master, the pleadings,
4 records, and files herein and the argument of counsel, and being
5 duly advised in the premises, and having made its final Findings
6 of Fact and Conclusions of Law, it is
7

8 ORDERED, ADJUDGED AND DECREED:
9

10 1. That as between RKO and Richard Cooper, all rights
11 in and to the use of the name, character, and story "King Kong",
12 other than the right to produce the motion picture photoplay "King
13 Kong" as published by RKO on February 24, 1933 and to copyright
14 and renew the copyright in the said motion picture photoplay, and
15 the right to produce the motion picture photoplay "Son of Kong" as
16 published by RKO and to copyright and renew the copyright in the
17 said motion picture photoplay, are exclusively vested in and
18 solely owned by Richard Cooper.
19

20 2. That Defendant and Cross-Defendant RKO is a con-
21 structive trustee of all of the rights in and to the character,
22 name, and story "King Kong" to the extent they have been exercised
23 by it at any time prior to the date of this Final Judgment, and
24 Richard Cooper is the sole beneficiary of said trust.
25

26 3. That Richard Cooper recover from Defendant and
27 Cross-Defendant RKO on his Cross-Complaint damages comprising all
28 profits earned by RKO from the use and the licensing of the use of

1 the name, character, and story "King Kong" in sequels to (exclud-
2 ing "Son of Kong") and remakes of the motion picture photoplay
3 "King Kong" and from the use and licensing of the use of the name,
4 character, and story "King Kong" in connection with the produc-
5 tion, distribution, sale, and promotion of games, toys, books,
6 pictures, models, and any other form of merchandising.

7
8 4. That the amount of said damages is as follows:

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10 (a) For the period between May 10, 1972 and October 31,
11 1977, in connection with RKO's licensing of Dino DeLaurentiis
12 Corporation ("DDL") to remake the motion picture photoplay "King
13 Kong" and to conduct associated merchandising, the sum of
14 \$1,601,033.56 plus interest at the legal rate from October 31,
15 1977.

16
17 (b) For the period between May 10, 1972 and December
18 31, 1976, in connection with RKO's licensing of the name, char-
19 acter, and story "King Kong" for non-DDLC merchandising, the sum
20 of \$33,755.20, plus interest at the legal rate from December 31,
21 1976.

22
23 (c) For the periods following October 31, 1977 and
24 December 31, 1976, respectively, and until such time as RKO shall
25 have complied with Paragraphs 6, 7, and 8 hereof, Richard Cooper
26 is entitled to damages comprising:
27
28

1 (1) The gross income received by RKO after October 31,
2 1977, in connection with the DDLC remake and associated merchan-
3 dising:

4
5 (i) Less expenses incurred in connection with
6 those matters identified in Findings of Fact 43, 44, 45,
7 46, 47, 48, 49, and 50;

8
9 (ii) Less fees and expenses paid to such accounting
10 firm or firms as RKO may employ for the purpose of
11 auditing DDLC's statements;

12
13 (iii) Plus interest at the legal rate on the net sum
14 payable, to be computed separately for each period
15 during which RKO receives payments from or on behalf of
16 DDLC.

17
18 (2) Eighty-five percent (85%) of the gross income
19 received by RKO after December 31, 1976 in connection with non-
20 DDLC merchandising, plus interest at the legal rate from the date
21 of each subsequent receipt.

22
23 5. That the allowance of the Special Master and the
24 costs of said reference, including fees for accounting services,
25 shall be borne by Cross-Defendant RKO.

26
27 6. That RKO execute assignments in favor of Richard
28 Cooper, in the form approved by the Court, of each of the out-

1 standing contracts by which RKO has or will obtain money as a
2 result of the use of the name, character, and/or story "King Kong"
3 in connection with sequels to (excluding "Son of Kong") or remakes
4 of the RKO motion picture photoplay "King Kong" and/or in connec-
5 tion with the use of the character, name, or story "King Kong" for
6 the production, distribution, sale, or promotion of any toys,
7 games, books, pictures, models, or any other form of merchandising.

8
9 7. That if some or all of the contracts executed by
10 RKO with regard to the activities listed in Paragraph 6 cannot be
11 assigned without the consent of the licensee or licensees there-
12 under, RKO shall diligently endeavor to obtain such consent.

13
14 8. That with regard to those contracts as to which a
15 restraint against assignment continues to exist after RKO has made
16 diligent efforts to obtain assignment, RKO shall regularly and
17 promptly account and pay over to Richard Cooper all of the monies
18 received thereunder.

19
20 9. That Cross-Complainant Richard Cooper shall recover
21 his costs to date in connection with the bringing of his Cross-
22 Complaint.

23
24 10. That this Judgment shall not affect the finding
25 that the serialization and novel KING KONG are in the public
26 domain.
27
28

1 11. That the Clerk shall enter this Final Judgment
2 forthwith, the Court expressly determining that there is no just
3 reason for delay.

4 Dated:

5 JAN 5 1981

6 MANUEL A. REAL

7 UNITED STATES DISTRICT JUDGE
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